

United States District Court
For the Southern District

LONNIE HARRELL,

Petitioner,

-against-

MARK MILLER, Superintendent of Green
Haven Correctional Facility,

Respondent.

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF HABEAS PETITION
APPENDIX OF EXHIBITS
VOLUME II of IV

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Motion to Vacate**

1 body of water?

2 A PROSPECTIVE JUROR: There is -- if I may? It
3 was a rock water.

4 MR. HERLICH: Was it deep, hopefully?

5 A PROSPECTIVE JUROR: Yeah.

6 MR. HERLICH: And, Mr. Hunter, you indicated a
7 conflict with the law and can I ask what it was about?

8 A PROSPECTIVE JUROR: Yeah. I just had some
9 unpaid violations, other little incidents, and I didn't pay
10 my fine. So I had warrants. So I got picked up and taken
11 in.

12 MR. HERLICH: Any problem with the burden of proof
13 remains with the prosecution and it's proof beyond a
14 reasonable doubt?

15 A PROSPECTIVE JUROR: (Indicating.)

16 MR. HERLICH: The burden never shifts to the
17 defense. Any problems with that?

18 A PROSPECTIVE JUROR: No problems, I understand.

19 MR. HERLICH: Mr. Mazitto, any problem with the
20 fact that you indicated your company -- was it your company
21 that's being investigated by the Attorney General?

22 A PROSPECTIVE JUROR: It is like an industry
23 global. We're cooperating with them, for your information.

24 MR. HERLICH: Anything about that have any impact
25 on your ability to be fair and impartial?

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1 A PROSPECTIVE JUROR: I don't believe so.

2 MR. HERLICH: Okay.

3 And, Mr. Cohen, you indicated you were actually a
4 juror in a rape jury?

5 A PROSPECTIVE JUROR: Yes.

6 MR. HERLICH: It doesn't go to verdict, correct?

7 A PROSPECTIVE JUROR: No, they -- the defendant
8 changed his plea.

9 MR. HERLICH: And how do you know that? Did the
10 judge tell that to you after you were discharged?

11 A PROSPECTIVE JUROR: No, no.

12 MR. HERLICH: Did you speak with the attorneys?

13 A PROSPECTIVE JUROR: After -- yeah, the judge let
14 us know after a morning recess.

15 MR. HERLICH: And did the -- what did the Judge,

16 --

17 If you can remember, what, if anything, did the
18 judge tell you that the case was resolved by a plea?

19 A PROSPECTIVE JUROR: Oh, that -- that the
20 defendant changed his mind and he wanted to plead guilty and
21 the judge told us what he was probably going to sentence him
22 to.

23 MR. HERLICH: He told you all of that?

24 A PROSPECTIVE JUROR: Yeah.

25 MR. HERLICH: Where was this, in the jury room?

1 A PROSPECTIVE JUROR: Yes.

2 MR. HERLICH: Dr. Joseph, there will probably be a
3 doctor testifying in this case. Maybe -- I don't know if
4 there will be any other hospital staff, social workers,
5 testifying, but there will be medical records in evidence.

6 If you're selected to be on the jury, all you can
7 draw on is your life experience but you can't be holding
8 yourself out to be a resident expert on medicine even though
9 you are. You are a juror just like anyone else. I don't
10 know how clear I'm making that.

11 Any problem with that?

12 A PROSPECTIVE JUROR: No.

13 MR. HERLICH: Okay, thank you.

14 Okay, Mr. Hargett, you have close friends in law
15 enforcement. Would that, in any way, affect your ability to
16 be fair in this case in terms of assessing the credibility
17 of witnesses?

18 A PROSPECTIVE JUROR: No.

19 MR. HERLICH: Ms. Dee, anything -- I guess this
20 was already asked -- anything about your uncle's experience
21 with the criminal justice system that would affect you in
22 any way?

23 A PROSPECTIVE JUROR: No.

24 MR. HERLICH: Ms. Frenkel, you were employed by
25 Joseph Tacopina. What did you do?

1 A PROSPECTIVE JUROR: Well, we had -- well, it was
2 an agency. So my part of the business, I was on the
3 production side, casting, while he handled the call action
4 down. We were not representing players, and so, we worked
5 with him while upholding his practice. Our agency, we were
6 located in his office. So there were a lot of -- always
7 something interesting was going on.

8 MR. HERLICH: I hear A-Rod isn't very happy with
9 him, but that's another story.

10 Mr. Grove, you said that you have a friend who is
11 a Brooklyn -- assistant district attorney in Brooklyn?

12 A PROSPECTIVE JUROR: Mm-hmm.

13 MR. HERLICH: And you had a minor conflict with
14 the law. Do you mind telling me what that was?

15 A PROSPECTIVE JUROR: Sure. It was an underage
16 drinking.

17 MR. HERLICH: That's one of the rights of the
18 adolescent passage to do.

19 A PROSPECTIVE JUROR: Six months shy to
20 twenty-one.

21 MR. HERLICH: In New York?

22 A PROSPECTIVE JUROR: No, this is in Pennsylvania.

23 MR. HERLICH: How long ago, if I may ask?

24 A PROSPECTIVE JUROR: I think fourteen, fifteen
25 years.

1 MR. HERLICH: Okay. When I was young in New
2 Jersey, the age was eighteen.

3 Mr. Kigel?

4 A PROSPECTIVE JUROR: Sure. I do have an issue
5 with a question that was posed to someone else.

6 MR. HERLICH: Go ahead.

7 A PROSPECTIVE JUROR: Someone not taking the stand
8 in their own defense.

9 MR. HERLICH: Right.

10 A PROSPECTIVE JUROR: Just thinking about it, as
11 you've gone through the line, I have a tough time -- I mean,
12 if I was accused of something I didn't do, I would be
13 standing up on the stand and letting everyone know I didn't
14 do it. If someone doesn't do it and leaves it to someone
15 else to make that argument for him, if we're speaking
16 honestly, I think I will hold it against that person.

17 MR. HERLICH: Okay.

18 I mean, when the Judge gave the preliminary
19 instructions, it's totally -- it's like one integrate
20 package where there's the presumption of innocence that's
21 connected to the burden of proof being exclusively of the
22 process. Someone once called it a dialectical person, some
23 fancy person.

24 Quite frankly, the defendant doesn't have a burden
25 of proof. It remains with the prosecution. So it follows

1 from that alone that an accused has no obligation to put on
2 a case or to present evidence. It's the People's
3 requirement to prove the charge beyond a reasonable doubt.
4 So, you cannot draw any inference unfavorable to Mr. Harrell
5 if he doesn't testify.

6 Despite your own personal beliefs that if you were
7 accused you would be on the witness stand in a heartbeat,
8 and Mr. Harrell may very well be on the witness stand but
9 that decision gets made later on in the case, and if you're
10 unable to follow the Judge's instruction that you cannot
11 draw an adverse inference against the accused if he doesn't
12 testify, now's the time to tell us. Do you think that will
13 be a real problem?

14 A PROSPECTIVE JUROR: I think it will be a
15 problem. Because I understand the legal logic of what you
16 would have to -- why you would have an attorney and speak
17 for you the entire time.

18 I'm saying from a reality standpoint, if someone's
19 saying I've done something and I haven't, I will stand up
20 and say I haven't. So, for me to -- I feel as if I cannot
21 be impartial regarding someone who doesn't share that.

22 MR. HERLICH: Okay.

23 A PROSPECTIVE JUROR: That's my honest view on
24 that.

25 MR. HERLICH: Okay.

1 Ms. Bowman, you indicated you were a criminal
2 juror?

3 A PROSPECTIVE JUROR: Yes.

4 MR. HERLICH: Did that case, without telling us
5 the verdict, did it go to verdict?

6 A PROSPECTIVE JUROR: It was a hung jury.

7 MR. HERLICH: Oh, it was a hung jury, okay.

8 A PROSPECTIVE JUROR: Yes.

9 MR. HERLICH: Was that frustrating for you?

10 A PROSPECTIVE JUROR: Very.

11 MR. HERLICH: Without telling me how people were
12 voting, how was it split, if you recall, the numbers?

13 A PROSPECTIVE JUROR: It's been awhile. So I
14 think it was more against than for.

15 MR. HERLICH: Okay.

16 Okay, Mr. Kigel, you said you were a grand juror?

17 A PROSPECTIVE JUROR: Yes.

18 MR. HERLICH: You got to assure us you can erase
19 the instructions you were given as a grand juror because the
20 burden of proof here is a preponderance of the evidence that
21 a crime was committed and the accused committed the crime.
22 Here, it's proof beyond a reasonable doubt.

23 Can you assure us you will follow those
24 instructions?

25 A PROSPECTIVE JUROR: Yes.

1 MR. HERLICH: Without any problem?

2 A PROSPECTIVE JUROR: Yes.

3 MR. HERLICH: Okay.

4 Mr. McCabe, your brother is a state police
5 officer, is that right?

6 A PROSPECTIVE JUROR: Yes.

7 MR. HERLICH: Okay.

8 And that is so interesting, that you work with the
9 police horses, right?

10 A PROSPECTIVE JUROR: Yes.

11 MR. HERLICH: Anything about the fact that your
12 brother's in law enforcement, would that impair your ability
13 to be fair and impartial in any way?

14 A PROSPECTIVE JUROR: No.

15 MR. HERLICH: Mr. Downing, any problem with the
16 burden of proof rests on the prosecution, they have to prove
17 their case beyond a reasonable doubt, and unless -- if they
18 fail to do so, you must find the accused not guilty, and if
19 obviously they convince you beyond a reasonable doubt that
20 they have proven their case, you find the accused guilty?
21 Any problems with those legal principles?

22 A PROSPECTIVE JUROR: Not at all.

23 MR. HERLICH: Ms. Merrick, can you be fair and
24 impartial in this case in light of your professional work?

25 A PROSPECTIVE JUROR: Yeah.

1 MR. HERLICH: Okay, great.

2 Your brother's in NYPD?

3 A PROSPECTIVE JUROR: Mm-hmm.

4 MR. HERLICH: Right.

5 Like you said, you hear it from both sides.

6 A PROSPECTIVE JUROR: Yes, yes.

7 MR. HERLICH: Okay.

8 Thank you.

9 THE COURT: Thank you.

10 Okay, jurors, at this time the law permits the
11 attorneys to take some time to review their notes and make
12 some decisions. So I will ask you to please step outside
13 for a few minutes. Thank you.

14 A COURT OFFICER: Make sure you have all your
15 belongings and step this way, please.

16 (Whereupon, the prospective jury panel exited the
17 courtroom.)

18 (Whereupon, the prospective jurors in the box
19 exited the courtroom.)

20 THE COURT: Okay, just before you look at your
21 notes, I believe that the defense has used six perempts, the
22 People have used one.

23 MS. PARK: Yes.

24 THE COURT: And I just want to remind you that we
25 only have about twelve or thirteen left in the audience. We

1 do have six sworn jurors, okay?

2 (Counsel conferring with defendant.)

3 THE COURT: Okay, we all set?

4 MR. HERLICH: Okay.

5 THE COURT: Looking at seats --

6 A COURT OFFICER: Excuse me, your Honor.

7 (Court Officer Conferring with the Court.)

8 THE COURT: I was just informed Ms. Merrick, seat'
9 sixteen, said she was feeling nervous and she's prone to
10 anxiety attacks. She says she's okay, but she wanted us to
11 know that.

12 Would you like me to bring her in and ask
13 additional questions?

14 MR. HERLICH: Yeah, I believe that will be --

15 THE COURT: So let's bring in Ms. Merrick, please.

16 A COURT OFFICER: Juror entering.

17 (Whereupon, the prospective juror entered the
18 courtroom.)

19 THE COURT: Ms. Merrick, thank you for coming back
20 in.

21 A PROSPECTIVE JUROR: Yeah.

22 THE COURT: So the court officer just conveyed
23 you're a little nervous.

24 A PROSPECTIVE JUROR: I was a little panicky,
25 yeah.

1 THE COURT: Do you suffer from panic attacks?

2 A PROSPECTIVE JUROR: Yeah, I'm in mental health
3 treatment. I take medication. I thought I'd be okay, but I
4 feel very nervous. So I don't know if that's normal.

5 THE COURT: It's normal. I think the attorneys
6 feel nervous.

7 A PROSPECTIVE JUROR: I'm in courts a lot. But
8 this feels very stressful. I feel very stressed out right
9 now.

10 THE COURT: Do you feel this is something you
11 could do?

12 A PROSPECTIVE JUROR: No, but I don't think it
13 will be good for me. I know that is a hard thing to say,
14 but...

15 MR. HERLICH: Do you believe that it is the nature
16 of the case that may be having an impact on you? I'm just
17 curious.

18 A PROSPECTIVE JUROR: Maybe, maybe. It is a lot
19 of potential violence. Maybe sex. I am a woman. Like I
20 said, my sister was sexually assaulted. So I think -- I
21 think it's -- yeah, I think my anxiety very hard for me to
22 be really fully present and logical.

23 THE COURT: Alright. Thank you. You can step
24 out.

25 A PROSPECTIVE JUROR: Okay.

1 (Whereupon, the prospective juror exited the
2 courtroom.)

3 THE COURT: Any objections to excusing her for
4 cause?

5 MR. HERLICH: No, your Honor.

6 MS. PARK: No.

7 THE COURT: Alright.

8 So looking at seats one through six, any
9 challenges for cause, People?

10 MS. PARK: Yes, Mr. Horneff, Juror Number 6.

11 MR. HERLICH: I concur.

12 THE COURT: We -- we have to make a record.

13 The reason is he indicated he will have a problem
14 with the statutory rape laws. He thought it will be a
15 little bit unfair if a defendant was lied to about the age
16 of the person. I grant the cause.

17 Any challenges for cause, one through six?

18 MR. HERLICH: No.

19 THE COURT: Any peremptory challenges, one through
20 six?

21 MS. PARK: Yes, number two, Mr. Eric Anderson.

22 PEREM THE COURT: Mm-hmm.

23 MS. PARK: And that's it.

24 THE COURT: Okay.

25 Defense, one through six, perempts?

1 (Counsel conferring with defendant.)

2 MR. HERLICH: Number four, Mr. Hill.

3 THE COURT: Okay. So, seat one becomes Juror
4 Number 7. Seat three becomes Juror Number 8. And seat five
5 becomes Juror Number 9.

6 Looking at seats seven, eight and nine, seven,
7 eight and nine, any challenges for cause, People?

8 MS. PARK: Yes.

9 THE COURT: For cause?

10 MS. PARK: I'm sorry, not for cause.

11 THE COURT: Okay.

12 How about the defense for cause, seven, eight,
13 nine?

14 MR. HERLICH: No.

15 THE COURT: Peremptory challenges, People?

16 MS. PARK: Yes, Juror Number 7, Mr. Mazitto.

17 THE COURT: Okay.

18 How about for the defense, eight or nine?

19 MR. HERLICH: Yes, Judge, number eight and number
20 nine by the defense.

21 THE COURT: Seats ten, eleven and twelve, ten,
22 eleven and twelve, any cause, People?

23 MS. PARK: No, Judge.

24 THE COURT: Defense for cause?

25 MR. HERLICH: No.

Challenges

1 THE COURT: Peremptory challenges, People?

2 MS. PARK: No.

3 THE COURT: Defense, peremptory challenges, ten,
4 eleven and twelve?

5 MR. HERLICH: One moment, your Honor.

6 (Counsel conferring with defendant.)

7 MR. HERLICH: Number twelve, your Honor, Ms.
8 Frenkel, by the defense.

9 THE COURT: Okay.

10 So seat ten becomes Juror Number 10. Seat eleven
11 becomes Juror Number 11.

12 Looking at seat thirteen, only thirteen, challenge
13 for cause, People?

14 MS. PARK: Yes. I believe he is the one who had
15 the issue with the defendant testifying.

16 THE COURT: Right.

17 You agree?

18 MR. HERLICH: That's correct.

19 THE COURT: I grant the challenge for cause as to
20 thirteen.

21 Seat fourteen, challenge cause, People?

22 MS. PARK: No.

23 THE COURT: Defense for cause?

24 MR. HERLICH: No, your Honor.

25 THE COURT: Peremptory challenge, People?

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Challenges

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1 MS. PARK: Yes.

2 THE COURT: Seat fifteen, challenge for cause,

3 People?

4 MS. PARK: No.

5 THE COURT: Defense for cause?

6 MR. HERLICH: No.

7 THE COURT: Peremptory challenge, People?

8 MS. PARK: No.

9 THE COURT: Defense, peremptory challenge?

10 MR. HERLICH: Yes.

11 THE COURT: Seat sixteen, challenge for cause,

12 People?

13 MS. PARK: No.

14 THE COURT: Defense for cause?

15 MR. HERLICH: No.

16 THE COURT: Peremptory challenge, People?

17 MS. PARK: Yes.

18 THE COURT: Seat seventeen is excused for cause.

19 Seat eighteen, any challenge, People?

20 MS. PARK: No.

21 THE COURT: Defense for cause?

22 MR. HERLICH: No.

23 THE COURT: Peremptory challenge, People?

24 MS. PARK: No.

25 THE COURT: Defense?

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1 MR. HERLICH: Yes, your Honor.

2 THE COURT: Okay.

3 So, we have eleven jurors. Let's swear them in
4 and then empanel the ones that are in the audience to see if
5 we can get our twelfth juror and our alternates.

6 Let's bring them back in, please.

7 A COURT OFFICER: In the box or in the audience?

8 THE COURT: In the audience.

9 A COURT OFFICER: Jury panel entering.

10 (Whereupon, the prospective jurors in the box
11 entered the courtroom.)

12 (Whereupon, the prospective trial jurors entered
13 the courtroom.)

14 THE COURT: Alright, jurors, please listen for
15 your name. If your name is called, that means that you've
16 been selected as a juror to this trial. Please come up with
17 your belongings, the court officer will show you where to
18 sit and that will be your seat for the remainder of the
19 trial.

20 THE CLERK: Stephanie Oster.

21 A COURT OFFICER: This way, please.

22 THE COURT: She's Juror Number 7.

23 THE CLERK: Lydia Zamm.

24 Colin Hunter.

25 Marcus Hargett.

1 And Malu Dee.

2 THE COURT: If you were in the jury box and your
3 name was not called, please go back downstairs to the
4 fifteenth floor.

5 If you were in the audience and you have not had a
6 chance to sit in the jury box, please remain in the
7 audience.

8 (Whereupon, the prospective jurors in the box
9 exited the courtroom.)

10 THE CLERK: Swear them in, Judge?

11 THE COURT: Yes, please.

12 THE CLERK: Jurors, please stand and raise your
13 right hand.

14 (Whereupon, the five prospective jurors were sworn
15 or affirmed in as trial jurors by the Clerk of the court.)

16 THE CLERK: Thank you.

17 Be seated, please.

18 THE COURT: Alright, jurors, as you can see, you
19 are jurors seven through eleven. We began jury selection on
20 -- late last week. We have six sworn. I believe we will
21 find our twelfth juror and alternate jurors from those who
22 remain in the audience. We will continue jury selection.

23 I ask you to come back tomorrow morning at
24 nine-thirty. Tomorrow morning at nine-thirty, you will hear
25 the preliminary instructions from me and then you will hear

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1 the opening statements from the attorneys.

2 Between now and then, as I said, I ask you to
3 please not discuss this case either among yourselves or with
4 anyone else.

5 Please continue to keep an open mind as to the
6 defendant's guilt or innocence.

7 Please do not form or express an opinion as to the
8 defendant's guilt or innocence. Basically just put this
9 case out of your mind.

10 I ask you to please be here promptly at
11 nine-thirty. When you arrive, do not come into the
12 courtroom. A court officer will come and get you when we're
13 ready for you.

14 If you are late for any reason, please give us a
15 call, tell us why you're delayed and when you expect to be
16 here. Once we have our sworn jury panel, we can conduct no
17 business until every single juror is present. Even if one
18 of you is late, we have to wait. Please keep in touch with
19 us. The court officer will take your contact information
20 and give you our contact information.

21 Ma'am, you have a question?

22 A SWORN JUROR: There was one question I didn't
23 answer that on the back of the form when I was reading from
24 the form.

25 I have a hearing aid. I don't believe it will be

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1 a problem but I may need something repeated.

2 THE COURT: That is not a problem. If you don't
3 hear something, if you need something repeated, just let us
4 know.

5 A SWORN JUROR: Okay.

6 THE COURT: That's no problem.

7 Okay, jurors, please step out.

8 A COURT OFFICER: Jurors, this way, please.

9 (Whereupon, the jury exited the courtroom.)

10 THE COURT: Okay, jurors in the audience, you've
11 seen how we do this. Please listen for your name. If your
12 name is called, just come on up.

13 THE CLERK: Seat number one, Theodoros Lardos,
14 L-A-R-D-O-S, first name T-H-E-O-D-O-R-O-S.

15 Seat number two, Erica Langen, L-A-N-G-E-N.

16 Seat number three, Micah Resnick, R-E-S-N-I-C-K,
17 first name M-I-C-A-H.

18 Seat number four, Juliana Diaz, D-I-A-Z, first
19 name J-U-L-I-A-N-A.

20 Seat number five, Alexandra Lavita, L-A-V-I-T-A,
21 A-L-E-X-A-N-D-R-A.

22 Seat number six, Rosa Luciano, L-U-C-I-A-N-O,
23 first name R-O-S-A.

24 Seat number seven, Samuel Cranin, C-R-A-N-I-N.

25 Seat number eight, Dimitar Gologanov,

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1 G-O-L-O-G-A-N-O-V, first name D-I-M-I-T-A-R.

2 Seat number nine, Nicholas Gustin, G-U-S-T-I-N.

3 Seat number ten, Sheila Hernandez,

4 H-E-R-N-A-N-D-E-S.

5 Seat number eleven, Dashiell Feiler, F-E-I-L-E-R,
6 first name D-A-S-H-I-E-L-L.

7 Seat number twelve, Denise Plunkett,

8 P-L-U-N-K-E-T-T.

9 Seat number thirteen, Victoria Barton-Kang-Kang,
10 B-A-R-T-O-N hyphen K-A-N-G.

11 THE COURT: Good afternoon, Mr. Lardos. We will
12 start with you, sir.

13 A PROSPECTIVE JUROR: Hi.

14 I live on the Upper East Side for the past five
15 years.

16 I'm not a native New Yorker. I immigrated to the
17 United States from my native country about fifteen years
18 ago.

19 I have an M.B.A. degree.

20 I'm divorced originally.

21 My spare time, I play soccer, I go to gym.

22 I've never been on the jury before.

23 Nor relatives ever been victim of crime.

24 I've been an law enforcement officer myself. My
25 father was a cop as well. I have several friends that are

Joanne Fleming

1 on duty.

2 THE COURT: When you say you are law enforcement,
3 what did you do?

4 A PROSPECTIVE JUROR: Military.

5 THE COURT: Okay.

6 A PROSPECTIVE JUROR: Military police.

7 THE COURT: Was this back in your country?

8 A PROSPECTIVE JUROR: Yes.

9 THE COURT: Which country was that?

10 A PROSPECTIVE JUROR: Cypress.

11 I have close friends on NYPD and several cousins
12 in different states that either from local enforcement or
13 federal level.

14 That's it.

15 THE COURT: Okay, thank you.

16 Good afternoon.

17 A PROSPECTIVE JUROR: Hello.

18 I have lived on the Upper East Side for just over
19 two years now.

20 I'm not a native New Yorker. I come from
21 Minnesota originally.

22 I am a medical laboratory scientist and I've been
23 doing that for over two years now.

24 I have a bachelor's degree.

25 I'm not married and I've never been married.

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1 And I have no children.

2 I have another adult and he is a musician.

3 In my spare time, I like to read, go running. I
4 play piano.

5 I've never been a juror before.

6 And I've never been the victim of a crime, nor has
7 any of my relatives.

8 And none of my relatives or close friends are
9 employed by law enforcement agency or are attorneys or
10 anything like that.

11 And no for questions ten through fifteen.

12 THE COURT: Thank you.

13 Good afternoon, Mr. Resnick.

14 A PROSPECTIVE JUROR: Hi.

15 I have lived at my present address on the East
16 Side for about a year.

17 I am a native New Yorker.

18 I am a resident physician. I am a pediatrician.
19 I'm in third year of training.

20 I have a medical degree.

21 I am married with one child.

22 My wife is a management consultant. My child is
23 too young to work.

24 In my spare time, I enjoy watching the Mets and
25 practicing medicine.

Joanne Fleming

1 I've never served on a jury before.

2 I have been a victim of crime and a relative has
3 been. I was mugged when a teenager growing up in New York
4 and my brother had recently had a laptop stolen when he was
5 in the city.

6 THE COURT: Would any of that affect your
7 ability to be impartial?

8 A PROSPECTIVE JUROR: No.

9 I have a friend in -- that works for the FBI.

10 Ten through fifteen -- I have a family member who
11 is in law and it would not prevent me from being impartial.

12 Thirteen, currently I'm working two weeks at night
13 at my hospital. That should not preclude me from fulfilling
14 my civic obligations if necessary.

15 THE COURT: Thank you.

16 Good afternoon, Ms. Diaz.

17 A PROSPECTIVE JUROR: Hi, good afternoon.

18 I am a native New Yorker.

19 I have lived on the west -- Upper West Side. Been
20 there two years.

21 I am a homemaker. I've been a homemaker for six
22 years.

23 I have a college degree.

24 I am married. We've been together ten years.

25 We do have two children, two young to work.

Joanne Fleming

Voir Dire - The Court

1 My husband works in investment banking.

2 In spare time, I like to run, play tennis.

3 I have never served in a jury before.

4 I don't have -- I don't know anyone who has been
5 the victim of a crime.

6 I don't know anyone in law enforcement.

7 And my brother-in-law had a conflict with the law,
8 but it would not prevent me from being impartial and it's
9 not related to this case.

10 And eleven through fifteen, no.

11 THE COURT: Thank you.

12 Good afternoon.

13 A PROSPECTIVE JUROR: Hi.

14 I live in Midtown East for about three years.

15 I'm not a native New Yorker. I'm from Indiana.

16 For a living, I'm in digital marketing and I've
17 done that for two and a half years.

18 I have a college degree.

19 Married.

20 No children.

21 My husband is a consultant.

22 In my spare time, I like to travel, photography.

23 I've never served on a jury before.

24 Let's see, I've been a victim of a burglary which
25 wouldn't, you know, affect in any way.

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1 Let's see, I have two family members in law
2 enforcement.

3 And, let's see, I have had an uncle who has had a
4 conflict with the law, but won't affect in any way.

5 And then questions eleven through fifteen, no.

6 THE COURT: Thank you.

7 Good afternoon.

8 A PROSPECTIVE JUROR: Good afternoon.

9 Okay, first of all, I am a nervous wreck and it
10 has to do with my health. I have high blood pressure. I'm
11 taking medication.

12 I'm going through some situations right now with
13 my twenty-two year old. I really don't want to get personal
14 right now, but I feel that this is not the correct time for
15 me to -- to -- I have served in the past and I don't think I
16 could do this.

17 THE COURT: Any objections?

18 MR. HERLICH: No.

19 MS. PARK: No.

20 THE COURT: We are going to excuse you, ma'am.
21 You can step out.

22 A PROSPECTIVE JUROR: Thank you.

23 A COURT OFFICER: Wait for me outside.

24 (Whereupon, the prospective juror exited the
25 courtroom.)

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1 THE COURT: Good afternoon, Mr. Cranin.

2 A PROSPECTIVE JUROR: Hello.

3 I've lived on the Upper East Side for most of my
4 life.

5 I guess technically I'm not a native New Yorker.
6 I was born in Chicago, although I've lived here for most of
7 my life.

8 For a living, I do public relations and digital
9 marketing.

10 I have a bachelor's degree.

11 Not married.

12 Don't have children.

13 My spare time, I practice photography, music,
14 guitar and piano.

15 I never served on a jury before.

16 I've never been the victim of a crime.

17 Never had a relative that has been either.

18 A friend of -- the father of a close friend of
19 mine is a defense attorney for the NYPD. But I don't
20 believe that would play a part in this.

21 And for ten through fifteen, no for all of them.

22 THE COURT: Thank you.

23 Good afternoon, sir.

24 A PROSPECTIVE JUROR: Good afternoon.

25 I live in Battery Park for four and a half years.

1 I am a software developer for the last
2 twenty-eight years.

3 I have high school degree.

4 I am married.

5 And we have two childrens -- two children. And
6 they are two kids. They don't do anything. I mean, they do
7 school.

8 My interests are Ping Pong, bicycling, kyacking.

9 No, I have never been a juror before.

10 Personally, multiple robberies of my house -- our
11 house. My wife was stabbed, but that was before we met.

12 THE COURT: Would any of that affect your ability
13 to be fair and impartial in this case?

14 A PROSPECTIVE JUROR: I don't think so.

15 THE COURT: Okay.

16 A PROSPECTIVE JUROR: I don't have close relatives
17 or friends who are working in defense or in police.

18 From ten to fifteen, I'm having trouble hearing.
19 Most of the time I hardly can understand your questions.

20 THE COURT: Was I too low?

21 A PROSPECTIVE JUROR: Yes.

22 THE COURT: Okay.

23 Do you normally have a hard time hearing?

24 A PROSPECTIVE JUROR: Yes.

25 THE COURT: If there is anything that happens that

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1 you don't understand, please just raise your hand and let us
2 know so we can repeat it, okay?

3 A PROSPECTIVE JUROR: Yes.

4 THE COURT: Okay.

5 Okay, good afternoon.

6 A PROSPECTIVE JUROR: Good afternoon.

7 I have been at my present address for two years.

8 I live in Midtown East.

9 I am a native New Yorker.

10 I work in commercial merchandising for a living.

11 I have a bachelor's degree.

12 And no, I have not been married. I have never
13 been married.

14 And I don't have children.

15 I do live with a partner and he works for the
16 educational system for a risk school.

17 I enjoy working out and museums.

18 I have served on a case before, in civil.

19 I am a victim of two crimes. One was a mugging
20 and the other one with -- I did originally come up to you.
21 I was touched as a child by an adult.

22 THE COURT: Would you be able to separate that
23 from what's happening in the courtroom?

24 A PROSPECTIVE JUROR: I didn't come up because I
25 didn't think to raise the issue. I'm shaking right now

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1 thinking about it. So I think it might impact me, yeah.

2 THE COURT: Okay.

3 Any objections?

4 MS. PARK: No.

5 MR. HERLICH: No.

6 THE COURT: We're going to excuse you, sir.

7 A PROSPECTIVE JUROR: Thank you.

8 THE COURT: We will continue with Ms. Hernandez in
9 the second row.

10 A COURT OFFICER: Just wait for me outside.

11 (Whereupon, the prospective juror exited the
12 courtroom.)

13 A PROSPECTIVE JUROR: I've lived in Washington
14 Heights for most of my life.

15 I am a native New Yorker.

16 I am a case manager. I've been doing that at my
17 current location for about a year.

18 I have a bachelor's degree.

19 I am married.

20 I have a child.

21 My husband is a collections agent in another
22 country and my child goes to school.

23 Spare time, I spend time with my son, and I read.

24 I've never served on a grand jury, nor have I been
25 a juror.

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1 I had a family member who was victim of a crime.

2 Number nine, no.

3 Number ten, I did have a brother-in-law that had
4 conflict with the law.

5 Eleven, twelve, thirteen and fourteen, no.

6 Number fifteen, might have problems due to my son.

7 I don't have much help at night. I don't know.

8 THE COURT: We generally don't work beyond
9 four-thirty.

10 Just getting back to you had someone in your
11 family had a conflict with the law?

12 A PROSPECTIVE JUROR: Yes.

13 THE COURT: Anything about that that would affect
14 your ability --

15 A PROSPECTIVE JUROR: No.

16 THE COURT: -- to be fair and impartial?

17 You said you had been a victim of a crime?

18 A PROSPECTIVE JUROR: My uncle.

19 THE COURT: Your uncle.

20 Would that affect your ability to be fair and
21 impartial?

22 A PROSPECTIVE JUROR: (Indicating.)

23 THE COURT: Okay, thank you.

24 Good afternoon.

25 A PROSPECTIVE JUROR: Good afternoon.

1 I've lived Upper West Side, five years.

2 I am not a native New Yorker. I'm from
3 Pennsylvania.

4 I am a grants writer, not-for-profit, for three
5 years.

6 I have a bachelor's.

7 I am not married.

8 I live with another adult, my partner, who is a
9 grad student in a clinical psychology program.

10 I read.

11 I have not served in a jury.

12 I do not have a relative who is a victim of a
13 crime.

14 And to number nine, also no.

15 And from ten to fifteen, no.

16 THE COURT: Thank you.

17 Good afternoon, Ms. Plunkett.

18 A PROSPECTIVE JUROR: Good afternoon, your Honor.

19 I have lived at my present address for eight years
20 on the Upper West Side.

21 I'm not a native New Yorker. I'm from Maryland.

22 I am an attorney. I have been an attorney for
23 over twenty years.

24 I have a J.D.

25 I'm married with two small children. I live with

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1 my spouse and my kids.

2 I spend time with my kids, read, cook and travel.

3 I have served on a grand jury in 2007 for
4 twenty-one and a half days. It was criminal.

5 I can't think of any relatives that have been the
6 victim of a crime.

7 I was not employed by a law enforcement, but when
8 I was a young associate, I was a special assistant district
9 attorney for the Norfolk County's D.A.'s Office in Dedham,
10 Massachusetts for four months prosecuting misdemeanors.
11 Currently, I'm in a law firm where quite a few of my
12 partners do criminal defense work. I probably have.

13 Cousin's a Secret Service agent. I probably know
14 other people in -- former colleague is a prosecutor now in
15 the Manhattan D.A.'s Office.

16 Let's see, my brother's had conflicts with the
17 law.

18 THE COURT: Would you be able to set that aside
19 and not let that affect you?

20 A PROSPECTIVE JUROR: Yes.

21 My occupation as a lawyer does require me to work
22 occasionally at night, but it shouldn't be an issue.

23 And I think that's it. All the other answers are
24 no.

25 THE COURT: What kind of law do you practice?

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1 A PROSPECTIVE JUROR: I am an antitrust litigator.

2 THE COURT: Thank you.

3 A PROSPECTIVE JUROR: Thank you.

4 THE COURT: Good afternoon.

5 A PROSPECTIVE JUROR: Hi.

6 I've lived at my present address in the Financial
7 District for two years.

8 I am in real estate investment since college.

9 I have a bachelor's degree.

10 I'm married.

11 No children.

12 My spouse is an administrator at an auction house.

13 I cook in my spare time.

14 Never been on a jury.

15 No relative victim of a crime.

16 No friends in law enforcement.

17 And I have a brother that's had conflicts with the
18 law but that wouldn't impair decision.

19 THE COURT: Thank you.

20 Jurors, please pass the questionnaires to the
21 right, thank you.

22 As we did before, the attorneys will address you.
23 At this time they will address you for about ten minutes
24 each.

25 Ms. Park.

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Voir Dire - The People

1 MS. PARK: Thank you.

2 Good afternoon, everyone.

3 VOICES FROM JURY BOX: Good afternoon.

4 MS. PARK: So I know you were all sitting out
5 there when I was going through -- when we were both going
6 through questions with the first jurors, and we're going to
7 cover pretty much -- well, at least I'm going to cover
8 pretty much the same issues. Before I do that, I do want to
9 follow up with some of the questions from the
10 questionnaires.

11 Mr. Lardos, I don't know if you said what you did
12 for a living. I know you mentioned that you were in the
13 military.

14 A PROSPECTIVE JUROR: I am a C.O.

15 THE COURT: Sorry what?

16 A PROSPECTIVE JUROR: Around the firm. I am the
17 C.O.

18 MS. PARK: Ms. Hernandez, you mentioned you are a
19 case manager?

20 A PROSPECTIVE JUROR: Yes.

21 MS. PARK: What kind of work -- I mean, what kind
22 of agency?

23 A PROSPECTIVE JUROR: It is a SORA for ex-homeless
24 that have mental disability.

25 MS. PARK: So, you heard me talk about the term

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1 statutory rape, that we have two theories of the case, one
2 is that -- that it was non-consensual because some type of
3 force was used, but there's the other component that it was
4 not consensual because the complaining witness in this case
5 is under the age of sixteen. And the Judge is going to
6 instruct you, I suspect, that if you're under the age of
7 sixteen, that you are incapable of consent.

8 And, again, whether you agree or disagree with
9 that law, is there anyone who has trouble accepting that law
10 and is unable to follow the Judge's instruction?

11 (Prospective jurors indicating.)

12 MS. PARK: I don't see anyone's hands.

13 Ms. Barton-Kang?

14 A PROSPECTIVE JUROR: (Indicating.)

15 MS. PARK: Any problems with that?

16 A PROSPECTIVE JUROR: No.

17 MS. PARK: Sir, will you have any problem with
18 that?

19 A PROSPECTIVE JUROR: I believe I can be
20 impartial, so I --

21 THE COURT: I can't hear you.

22 A PROSPECTIVE JUROR: I believe I can be
23 impartial. So I think judgment is based on the --

24 THE COURT: Let's use the microphone. Sir, we
25 have to make sure we hear everything you are saying.

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1 A PROSPECTIVE JUROR: I believe I can be
2 impartial. However, it is a social moral to take into
3 account most of the people or everybody who was part of
4 that. I think I can follow the law.

5 THE COURT: You can follow the law?

6 A PROSPECTIVE JUROR: Yes.

7 THE COURT: Okay.

8 MS. PARK: Mr. Cranin?

9 A PROSPECTIVE JUROR: Yes.

10 MS. PARK: Can you give us an assurance that you
11 can follow the law?

12 A PROSPECTIVE JUROR: Yes.

13 MS. PARK: You also heard me talk about some of
14 the things that's related to the forcible component: That
15 you might not hear the complaining witness in this case
16 fighting vigorously or fighting maybe the way that you would
17 expect someone, a victim of a sexual assault, might fight.

18 As you sit here today, can you keep an open mind
19 and listen to the witness' testimony before you make any
20 judgments about the credibility of that witness?

21 And I'm going to start with Ms. Lavita. Can you
22 keep an open mind at this point?

23 A PROSPECTIVE JUROR: Yes.

24 MS. PARK: You can give us your assurance that you
25 will listen to the testimony of the witnesses and wait until

1 the end until you make your final determination?

2 A PROSPECTIVE JUROR: Yes, I will try.

3 MS. PARK: I'm sorry, you said you'll try?

4 A PROSPECTIVE JUROR: Mm-hmm.

5 THE COURT: Sorry, you said yes?

6 A PROSPECTIVE JUROR: I said yes, I'll try.

7 THE COURT: Okay.

8 MS. PARK: Ms. Diaz, what about you, can you give
9 us an assurance?

10 A PROSPECTIVE JUROR: Yes.

11 MS. PARK: And, Mr. Resnick, what about you?

12 A PROSPECTIVE JUROR: Yes.

13 MS. PARK: And you also heard me talk about
14 people's reaction to the traumatic situations. Can you all
15 accept that?

16 Let's start with Ms. Langen.

17 A PROSPECTIVE JUROR: (Indicating.)

18 MS. PARK: Can you accept different reactions of
19 people to certain traumatic experience?

20 A PROSPECTIVE JUROR: Yes.

21 MS. PARK: And what about the complaining witness,
22 can you give us the assurance and listen to her testimony
23 with an open mind?

24 A PROSPECTIVE JUROR: Yes.

25 MS. PARK: Any preconceived notions at this point?

Voir Dire - The People

1 A PROSPECTIVE JUROR: No.

2 MS. PARK: And what about you, Mr. Feiler?

3 A PROSPECTIVE JUROR: Feiler.

4 MS. PARK: I'm sorry, can you just --

5 A PROSPECTIVE JUROR: Feiler.

6 MS. PARK: What about you, can you give us your
7 assurance that you can listen to the victim's testimony?

8 A PROSPECTIVE JUROR: Yes.

9 MS. PARK: And the fact she might not react the
10 way you think a victim of a sexual assault should react,
11 would that preclude you from believing her?

12 A PROSPECTIVE JUROR: No.

13 MS. PARK: Ms. Plunkett, what about you?

14 A PROSPECTIVE JUROR: No.

15 MS. PARK: Any issues with what's been said so
16 far?

17 A PROSPECTIVE JUROR: Nothing.

18 MS. PARK: And I guess that goes for everybody, is
19 there something that was said that gives you pause about
20 being fair and impartial to this case both to the People and
21 also to the defense?

22 (Prospective jurors indicating.)

23 MS. PARK: I thank you for your time.

24 THE COURT: Thank you, Ms. Park.

25 Mr. Herlich.

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1 MR. HERLICH: Mr. Lardos, you worked in law
2 enforcement in the military. Were you also a police officer
3 in this country or was that in Cypress?

4 A PROSPECTIVE JUROR: That was Cypress, when I was
5 a lieutenant.

6 MR. HERLICH: Do you feel that you can be fair?
7 Will you always favor the law enforcement position in this
8 case?

9 A PROSPECTIVE JUROR: I grew up in a family with
10 basically a lot of law enforcement, but I will respect the
11 old country values in this country.

12 Now, I have extended family here as well. That's
13 through my professionalism. We have a company and we have a
14 lot of people that work for the federal government and work
15 with us. That goes with my partner. His wife is military
16 secretary. I tend to look at the law first and I trust the
17 law, people, then I get the facts.

18 THE COURT: Can you give us your assurance --

19 Despite your background, can you give us your
20 assurance that you will not give the police witnesses any
21 greater credibility than any other witness until you've
22 heard them, you've seen them, you heard what they had to say
23 and you can form your opinion about that?

24 A PROSPECTIVE JUROR: I can try my best.

25 THE COURT: You're not sure?

1 A PROSPECTIVE JUROR: I am not sure.

2 THE COURT: Okay.

3 MR. HERLICH: Ms. Langen.

4 A PROSPECTIVE JUROR: Langen.

5 MR. HERLICH: You work as medical laboratory
6 scientist. What kind of work do you do?

7 A PROSPECTIVE JUROR: Basically, when you get the
8 bloods drawn at the hospital, I do those tests.

9 MR. HERLICH: Metabolic panels and all that stuff?

10 A PROSPECTIVE JUROR: Yes, blood.

11 MR. HERLICH: How long have you been doing that?

12 A PROSPECTIVE JUROR: Just over two years.

13 MR. HERLICH: And you probably heard from your
14 position in the audience that the burden of proof is on the
15 prosecution. Any problem with that? They have to prove
16 their case beyond a reasonable doubt.

17 A PROSPECTIVE JUROR: No, no problem.

18 MR. HERLICH: And if my client, who I believe is
19 going to testify in this case, but if he decides not to, you
20 can't hold that against him. Any problem with that?

21 A PROSPECTIVE JUROR: No problem.

22 MR. HERLICH: Okay.

23 Dr. Resnick?

24 A PROSPECTIVE JUROR: Yes.

25 MR. HERLICH: You have friends in the FBI?

1 A PROSPECTIVE JUROR: Yeah.

2 MR. HERLICH: Any reason that would make you
3 favorable to law enforcement --

4 A PROSPECTIVE JUROR: No.

5 MR. HERLICH: -- when you assess witness
6 credibility in this case?

7 A PROSPECTIVE JUROR: No.

8 MR. HERLICH: The fact that you will be working at
9 night during the case --

10 A PROSPECTIVE JUROR: I'm scheduled to be, but I
11 have back-up coverage if necessary.

12 MR. HERLICH: In other words, will you be able to
13 stay awake during the trial?

14 A PROSPECTIVE JUROR: Yes. I will not be working
15 at night. I will be here and at night someone else will be
16 doing it.

17 MR. HERLICH: Okay, thank you.

18 Ms. Diaz, you indicated that it was your brother
19 who had a conflict with the law?

20 A PROSPECTIVE JUROR: Brother-in-law.

21 MR. HERLICH: Brother-in-law.

22 Anything about that that would affect your ability
23 to be fair in this case?

24 A PROSPECTIVE JUROR: No.

25 Sorry, can you provide documentation that I am a

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1 juror?

2 THE COURT: Yes.

3 A PROSPECTIVE JUROR: That should be fine.

4 MR. HERLICH: Ms. Lavita, you indicated you have
5 two family members in law enforcement?

6 A PROSPECTIVE JUROR: Yes.

7 MR. HERLICH: Will that have impairment, impair
8 your ability to be fair and impartial in this case?

9 A PROSPECTIVE JUROR: No, I don't believe so.

10 MR. HERLICH: Well, the magic words: Can you
11 assure us that you won't? Can you assure us that you will
12 judge police testimony the same you would a civilian witness
13 in terms of assessing credibility, or would you favor law
14 enforcement testimony by virtue of the fact that it is a law
15 enforcement official who's testifying?

16 A PROSPECTIVE JUROR: I mean, I would try to be
17 fair, but I think I would favor law enforcement.

18 THE COURT: Well, I can appreciate that that's how
19 you feel coming in. Can you give us the assurance you will
20 follow my instruction that you are to treat all the
21 witnesses the same and not pass judgment on how credible
22 they are until after you've heard from them and listened to
23 what they had to say? Can you do this, or you're already
24 coming in giving the police a --

25 A PROSPECTIVE JUROR: I can do that.

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1 THE COURT: You can do that, okay.

2 A PROSPECTIVE JUROR: Yes.

3 MR. HERLICH: Mr. Cranin, did I say it right?

4 A PROSPECTIVE JUROR: Cranin.

5 MR. HERLICH: You stated that the father of your
6 close friend is an attorney for the police department?

7 A PROSPECTIVE JUROR: Correct.

8 MR. HERLICH: Is that civil litigation? Is it
9 lawsuits that he's defending what that person does, if you
10 know, or you're not even sure?

11 A PROSPECTIVE JUROR: To be totally honest, I'm
12 not exactly sure what his role is specifically.

13 MR. HERLICH: Right.

14 A PROSPECTIVE JUROR: I think it's defending
15 lieutenants in the NYPD.

16 MR. HERLICH: Okay.

17 A PROSPECTIVE JUROR: I believe.

18 MR. HERLICH: So, would anything about that in any
19 way affect your ability to judge every witness that appears
20 in this case using the same standards that you use to assess
21 credibility and accuracy and truthfulness without -- with
22 regard to whether they're law enforcement personnel or
23 civilians?

24 A PROSPECTIVE JUROR: That relationship would not
25 affect that, no.

1 MR. HERLICH: Ms. Hernandez, I have you also
2 indicated, was that your brother-in-law, who had a conflict
3 with the law?

4 A PROSPECTIVE JUROR: (Indicating.)

5 MR. HERLICH: Anything about that that would have
6 an affect on you how you sit in this case?

7 A PROSPECTIVE JUROR: No.

8 MR. HERLICH: As far as your ability to be fair?

9 A PROSPECTIVE JUROR: No, it's fine.

10 MR. HERLICH: Mr. Feiler, anything about the
11 Judge's instructions that you have any issues with if Mr.
12 Harrell elects not to testify, you can't hold it against
13 him? Any problem with that?

14 A PROSPECTIVE JUROR: No.

15 MR. HERLICH: Ms. Plunkett, you were a grand
16 juror?

17 A PROSPECTIVE JUROR: Yes.

18 MR. HERLICH: Correct?

19 Okay, so whatever you learned there, forget it.
20 Because it is a different standard of proof. Here, it's
21 proof beyond a reasonable doubt that remains with the
22 prosecution.

23 Can you assure us that you will hold the
24 prosecution to their burden of proof?

25 A PROSPECTIVE JUROR: Yes, I can.

1 MR. HERLICH: And Ms. Barton-Kang, can your
2 brother -- was it your brother who had a conflict with the
3 law?

4 A PROSPECTIVE JUROR: My half brother, yes.

5 MR. HERLICH: Okay.

6 Anything about that that would prevent you from
7 being fair in this case?

8 A PROSPECTIVE JUROR: No, not at all.

9 MR. HERLICH: Thank you.

10 THE COURT: Thank you.

11 Jurors, I ask you to please step outside for a few
12 minutes.

13 A COURT OFFICER: Jurors, make sure you have all
14 your belongings and follow me.

15 (Whereupon, the prospective jurors in the box
16 exited the courtroom.)

17 THE COURT: Why don't you take a few minutes to
18 look at your notes?

19 (Counsel conferring with defendant.)

20 THE COURT: You ready?

21 MS. PARK: Yes.

22 THE COURT: We will take one at a time.

23 Seat number one, People, any challenge? For
24 cause.

25 MS. PARK: Yes.

Challenges

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1 THE COURT: Okay.

2 You consent?

3 MR. HERLICH: Yes.

4 THE COURT: He said that he would favor police
5 testimony. I grant the challenge for cause.

6 Seat number two, any challenge for cause by either
7 one of you?

8 MS. PARK: No.

9 MR. HERLICH: No.

10 THE COURT: Peremptory challenge, People?

11 MS. PARK: No.

12 THE COURT: Peremptory challenge, Mr. Herlich?
13 (Counsel conferring with defendant.)

14 MR. HERLICH: Yes, your Honor.

15 THE COURT: Okay.

16 Seat number three, any challenge for cause by
17 either one of you?

18 MS. PARK: No.

19 MR. HERLICH: No.

20 THE COURT: Peremptory challenge, People?

21 MS. PARK: No.

22 THE COURT: Defense, peremptory challenge?

23 MR. HERLICH: No.

24 THE COURT: Seat three becomes Juror Number 12.

25 Let's pick our alternates. Seat four, any

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1 challenge for cause?

2 MS. PARK: No.

3 THE COURT: Mr. Herlich, challenge for cause?

4 MR. HERLICH: No.

5 THE COURT: Peremptory challenge, People?

6 MS. PARK: No.

7 THE COURT: Defense, peremptory challenge?

8 MR. HERLICH: No.

9 THE COURT: No peremptory challenge.

10 Juliana Diaz becomes Alternate Number 1.

11 Seat five, challenge for cause, People?

12 MS. PARK: No.

13 THE COURT: Defense, for cause?

14 MR. HERLICH: No.

15 THE COURT: Peremptory challenge, People?

16 MS. PARK: No.

17 THE COURT: Defense?

18 MR. HERLICH: Yes.

19 THE COURT: Alright.

20 Seat six was excused for cause.

21 Seat seven, any challenge for cause by either

22 side?

23 MS. PARK: No.

24 MR. HERLICH: No.

25 THE COURT: Peremptory challenge, People?

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1 MS. PARK: Yes.

2 THE COURT: Seat eight, any challenge for cause
3 from either one of you?

4 MS. PARK: No.

5 MR. HERLICH: No.

6 THE COURT: Peremptory challenge, People?

7 MS. PARK: Yes.

8 THE COURT: Seat nine was excused for cause.

9 Seat ten, any challenge for cause either one of
10 you?

11 MR. HERLICH: No.

12 MS. PARK: No.

13 THE COURT: People are out of challenges
14 peremptorily for the alternate there.

15 Any peremptory challenge from the defense?

16 MR. HERLICH: No.

17 THE COURT: So seat ten becomes Alternate Number
18 2.

19 Seat eleven, any challenge for cause from either
20 one of you?

21 MR. HERLICH: No.

22 THE COURT: Peremptory challenge, People?

23 MS. PARK: I don't have any, no.

24 THE COURT: No, you do.

25 MS. PARK: Oh, that's right.

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1 No, Judge.

2 THE COURT: How about the defense, peremptory
3 challenge?

4 MR. HERLICH: No.

5 THE COURT: Okay, seat eleven becomes Alternate
6 Number 3.

7 Let's go for one more. Seat twelve, any challenge
8 for cause from either one of you?

9 MR. HERLICH: No.

10 MS. PARK: No.

11 THE COURT: Peremptory challenge, People?

12 MS. PARK: No.

13 THE COURT: Defense, peremptory challenge?

14 MR. HERLICH: Yes your Honor.

15 THE COURT: And then seat thirteen, any challenge
16 for cause from either one of you?

17 MR. HERLICH: No.

18 MS. PARK: No.

19 THE COURT: Peremptory challenge, People?

20 MS. PARK: No.

21 THE COURT: Defense, peremptory challenge?

22 MR. HERLICH: No.

23 THE COURT: Alright, we have four alternates.

24 Let's bring them in, please.

25 What time did the defendant get here today?

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1 THE SERGEANT: He was in the building around nine
2 -- about ten o'clock, I would say.

3 THE DEFENDANT: No.

4 THE SERGEANT: They were telling us he was in the
5 building. He went actually here.

6 THE DEFENDANT: I was downstairs a quarter to
7 nine.

8 THE COURT: You were downstairs at quarter to
9 nine?

10 THE DEFENDANT: There was an alarm, something
11 happened in the pen.

12 THE SERGEANT: That's not what they told us.

13 A COURT OFFICER: Jurors entering.

14 (Whereupon, the prospective jurors in the box
15 entered the courtroom.)

16 THE COURT: Jurors, please listen for your name.
17 If your name is called, it means that you've been selected
18 as a juror for this trial.

19 Please take all your belongings with you. The
20 court officer will show you where to sit and this will be
21 your seat for the remainder of the trial.

22 Seat number twelve, Micah Resnick.

23 A COURT OFFICER: This way, please.

24 THE CLERK: Alternate 1, Juliana Diaz.

25 Alternate Number 2, Sheila Hernandez.

1 Alternate 3, Dashiell Feiler.

2 Alternate 4, Victoria Barton-Kang.

3 THE COURT: Those of you in the audience, thank
4 you very much. You can go downstairs to the fifteenth
5 floor.

6 (Whereupon, the prospective jurors in the box
7 exited the courtroom.)

8 THE COURT: Let's swear them in.

9 THE CLERK: Raise your right hand, please.

10 (Whereupon, the five prospective jurors were sworn
11 or affirmed in as trial jurors by the Clerk of the court.)

12 THE CLERK: Have a seat.

13 THE COURT: Thank you.

14 Please have a seat.

15 You were here when I gave the other jurors my
16 instructions. I will repeat them to you as well:

17 Please do not discuss the case either among
18 yourselves or with anyone else.

19 Please continue to keep an open mind as to the
20 defendant's guilt or innocence.

21 Please do not form or express an opinion as to the
22 defendant's guilt or innocence.

23 I ask you to please be back tomorrow at
24 nine-thirty. Just wait outside in the hallway and we will
25 go outside and invite you in when we're ready for you.

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1 If you're going to be delayed for any reason
2 whatsoever, please give us a call. We have a total of
3 sixteen jurors and we can conduct no business until every
4 single juror is present. If you're going to be delayed,
5 please call us and let us know what's going on so we can let
6 everybody else know.

7 I will see you tomorrow at nine-thirty.

8 (Whereupon, the five sworn trial jurors exited the
9 courtroom.)

10 THE COURT: People, how long do you expect the
11 opening statement to be?

12 MS. PARK: About twenty minutes.

13 THE COURT: Mr. Herlich?

14 MR. HERLICH: A few minutes, Judge.

15 Your Honor, I think maybe we should take up the
16 issue of what in the medical records is still in dispute
17 between the parties.

18 THE COURT: Sure.

19 MR. HERLICH: Okay.

20 Okay, in the medical records, Judge, on page four
21 of six --

22 THE COURT: I don't have a copy, by the way.

23 MS. PARK: I don't have an extra, but I can give
24 it to you.

25 MR. HERLICH: I can read you the part that I was

1 objecting to.

2 THE COURT: Okay.

3 MR. HERLICH: It is a narrative from the
4 complainant about what happened to her, including scratches
5 to her right cheek, she said she was choked. That's legally
6 proper for treatment and the diagnosis.

7 But then she says quote: And the perpetrator
8 threatened to kill her and her family if she didn't comply.
9 I would argue, from my point of view, your Honor, that's not
10 necessary for treatment or diagnosis.

11 THE COURT: Ms. Park, you don't agree?

12 MS. PARK: Yes, I don't agree with that.

13 THE COURT: Why? How do you see it?

14 MS. PARK: I mean, she's there for treatment and
15 diagnosis. The diagnosis here is the reason she's at the
16 hospital, is because she was a victim of a sexual assault.
17 The verbal threat is a part of that.

18 THE COURT: Okay.

19 I disagree. I think -- I think that the first
20 part having to do with the scratches and everything that
21 goes to the physical injury and the alleged crimes, I can
22 certainly see how that's necessary for treatment and
23 diagnosis.

24 I don't see the additional statements that she was
25 threatened, that he was going to come back, I don't really

1 see that as any kind of an exception for going to treatment
2 or treatment and diagnosis. You can strike that portion.

3 MR. HERLICH: Okay.

4 And, your Honor, in the page two of six from the
5 comprehensive sexual assault assessment form, it's similar
6 language. It says -- in addition to the actual details of
7 the alleged sexual assault, it says: Patient was threatened
8 by neighbor. So, my application would be that that's not
9 necessary for treatment or treatment and diagnosis.

10 MS. PARK: Judge, I submit all the threats,
11 especially in this case -- I know there are cases where it
12 talks about, in a domestic violence relationship, the
13 threats are relevant to discharge planning, the safety plan
14 for the victim. Here, the victim is being -- you know,
15 defendant is the victim's neighbor. So, arguably, it's
16 relevant to her discharge plan, her safety.

17 THE COURT: Can you tell me that that was in fact
18 considered when they put together the discharge plan?

19 MS. PARK: I mean, I can't say that unless I speak
20 to the hospital.

21 THE COURT: Alright.

22 So, for the time being, I will rule that should
23 also being stricken. If at a later time you can represent
24 that those statements were considered and factored into
25 whatever discharge plan was put together, then I will

1 reconsider.

2 MS. PARK: Judge, I will ask you to consider the
3 case that I've already submitted to this Court, in People v.
4 Pham, 118 AD 3d, 1159, where there, the entirety of the
5 medical records were admissible because the doctor in that
6 case testified that it assisted her with treatment and
7 diagnosis.

8 THE COURT: Alright, but I just asked you if it's
9 your understanding that these statements were actually
10 useful in fact for putting together a discharge plan. Can
11 you tell me that those statements were -- I mean, you've
12 spoken to the doctors.

13 MS. PARK: Yes.

14 THE COURT: Can you tell me about the additional
15 statements about the threats that were useful to the doctors
16 in treating this victim?

17 MS. PARK: Judge, I can't give that answer now. I
18 will ask the doctor.

19 THE COURT: Okay.

20 Well, then, at this point the decision that you
21 cite is not applicable. It's not on point, so...

22 MR. HERLICH: Just a couple of more points, Judge.

23 THE COURT: Okay.

24 MR. HERLICH: On page two of six of the regular
25 medical record, it says -- and I'm not sure, let me just

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1 check if Ms. Park agrees with me --

2 (Counsel conferring with counsel.)

3 MR. HERLICH: There is a sentence in the record --
4 obviously when the complainant talks about the sexual
5 assault, that's part of the -- that's necessary for
6 treatment, your Honor, but patient told EMS slash NYPD that
7 man from her building sexually assaulted patient. I think
8 it's hearsay.

9 THE COURT: Well --

10 MR. HERLICH: It's not clear. Did the patient
11 tell this to the doctors or did they talk to the EMS
12 technicians when they brought her in? I don't know.

13 THE COURT: Based upon what you're representing to
14 this Court, that's the chief complaint, right, and that's
15 what she's being treated for.

16 MR. HERLICH: Okay.

17 THE COURT: So I don't have a problem with it.

18 MR. HERLICH: Just two more things, your Honor.

19 On page four of six, she says the assailant's name
20 is Lonnie Harrell, and I have one case from the Court of
21 Appeals where a nurse testified that the parties basically,
22 or the Judge ruled, that the nurse was prohibited from
23 testifying regarding the identity of the perpetrator as not
24 necessary for treatment and diagnosis, so...

25 MS. PARK: I mean, I'll redact Lonnie Harrell.

1 THE COURT: I don't see any reason why that should
2 come in. Besides, that was her position from the first
3 excited utterance.

4 MR. HERLICH: Right.

5 THE COURT: So there's nothing new there.

6 MR. HERLICH: And the last thing I wanted to
7 bring, your Honor, to your attention, is the following day
8 the complaining witness and her mom went to the Spencer Cox
9 Center For Health part of St. Luke's. I think primarily the
10 follow-up was for getting prophylactic medications for
11 transmitting sexual diseases, that's what I surmise, but
12 there are a number of statements that are in here that I
13 have not yet gone over with Ms. Park, but, for example,
14 quote patient's mother reported, and it goes on to say what
15 the mother --

16 THE COURT: You haven't had a chance to go over
17 that with her. I will encourage you to do that. I will
18 encourage you to do that.

19 MR. HERLICH: We will do that.

20 THE COURT: I will see you tomorrow nine-thirty.

21 MS. PARK: Judge, just before we are released, so
22 I don't know if you're aware about this week, they have a
23 thing going on at the UN.

24 THE COURT: The general assembly.

25 MS. PARK: Yes.

1 The NYPD is very reluctant, or actually refusing,
2 to give us the officers that I need, and I'm wondering if
3 you would sign a so-ordered subpoena so I can get them to
4 come here and testify.

5 THE COURT: Yes, I'll sign it. You have it with
6 you now?

7 MS. PARK: Yes.

8 A COURT OFFICER: (Handing.)

9 THE COURT: Here you go.

10 A COURT OFFICER: (Handing.)

11 THE COURT: Thank you.

12 MS. PARK: Thank you, your Honor.

13 MR. HERLICH: Thank you, Judge.

14 (Whereupon, the trial was adjourned to Tuesday,
15 September 29th, 2015.)
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Joanne Fleming

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 59

THE PEOPLE OF THE STATE OF NEW YORK

Indictment
No. 4258/14

-against-

Crim. Sex Act 1

Jury Trial

LONNIE HARRELL,

Defendant.

September 29th, 2015

100 Centre Street
New York, NY 10013

B e f o r e :

HONORABLE JUAN M. MERCHAN,

Justice.

Appearances:

CYRUS R. VANCE, JR., ESQ.
District Attorney, New York County
BY: JUNG PARK, ESQ.
Assistant District Attorney

THEODORE HERLICH, ESQ.
Attorney for Defendant

Joanne Fleming
Amalia Hudson
Senior Court Reporters

1 (In open court)

2 THE CLERK: Continuing case on trial, People
3 versus Lonnie Harrell.

4 THE COURT: Good morning.

5 MS. PARK: Good morning.

6 MR. HERLICH: Good morning.

7 THE COURT: So, we're ready to get started?

8 MS. PARK: Yes.

9 MR. HERLICH: Yes.

10 Two things, Judge. Is it possible to get daily
11 copy --

12 THE COURT: Yes.

13 MR. HERLICH: -- pursuant to 18B.

14 The other issue was: Would the Court consider any
15 preliminary instruction, or, in the alternative, I can just
16 briefly address it in my opening, that sexual assault is the
17 generic term that characterizes this case, however,
18 throughout the medical records, and even the Nine-One-One
19 call, terms like rape and sexual abuse are used when they're
20 not the legal definitions? I don't know --

21 THE COURT: I think that you can definitely say to
22 them to keep an open mind as to what these things mean.

23 MR. HERLICH: Right.

24 THE COURT: And at the end of the trial, I will
25 instruct them on what the legal definition for these things

1 are.

2 MR. HERLICH: That's fine, your Honor, thank you.

3 MS. PARK: Judge, I do have one thing to put on
4 the record, but should I wait until the defendant comes out?

5 THE COURT: Yes.

6 A COURT OFFICER: One coming in.

7 (Whereupon, the defendant entered the courtroom.)

8 THE COURT: Good morning, Mr. Harrell.

9 THE DEFENDANT: Hello, sir.

10 THE COURT: Yes, Ms. Park?

11 MS. PARK: Judge, during the incident, the victim
12 is going to testify about the verbal threats that the
13 defendant made against her, and one of them involved: If
14 you tell anyone -- if you tell anyone, I'm going to hurt you
15 and I don't care if I go to jail, I've done time.

16 I mean, I don't know how to remove that statement
17 from her testimony because it's part of what caused her to
18 comply with him and what caused her to be threatened by him.

19 THE COURT: Right.

20 MS. PARK: And, you know -- you know, you can give
21 an instruction that that's not being admitted for its truth.
22 You know, it's not necessarily that he actually has done
23 time but he used that to, you know, instill some kind of
24 fear in her.

25 THE COURT: Mr. Herlich, how do you think we

1 should handle it?

2 MR. HERLICH: Quite frankly, it seems to me, being
3 an old schooler, part of the res gestae, if it's part of the
4 criminal act or it is a verbal act, I don't know if I -- I
5 mean, I can ask it be redacted but it's part of the verbal
6 act that is an element of the crime charged. I don't see
7 how that -- that it would be subject to redaction.

8 THE COURT: Well, an argument can certainly be
9 made that it was part of the crime and an element in that it
10 constituted a part of the force, right?

11 MS. PARK: Right.

12 THE COURT: But I believe that in this case there
13 is a way to make just a slight redaction to it so that you
14 can use the statement without there being any undue
15 prejudice, and that is, simply, eliminate the very last line
16 where he says I've done time. You can use the statement in
17 its entirety, you know, he's threatening I don't care if I
18 go to jail, but just exclude the part that says I've done
19 time.

20 MS. PARK: And if I can just have a moment before
21 she testifies and she's going to be my first witness, Judge.

22 THE COURT: Okay.

23 Why don't you go outside, then? I'm about to
24 bring the jurors in.

25 MS. PARK: She's in my office. I wasn't sure

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Opening - The Court

1 whether there was a witness room here.

2 THE COURT: We use a jury room for the witnesses.

3 MS. PARK: Can I just have five --

4 THE COURT: Actually, you know what? My
5 preliminary instructions and your opening statements will
6 take us to our first break.

7 So let's just bring them in, please.

8 A COURT OFFICER: Jury entering.

9 All rise, please.

10 THE COURT: Please rise.

11 THE SERGEANT: All rise, jury entering.

12 THE COURT: You can remain seated.

13 (Whereupon, the jury entered the courtroom.)

14 THE COURT: Please be seated.

15 Thank you.

16 THE CLERK: Continuing case on trial, People
17 versus Lonnie Harrell.

18 All parties and all jurors are present.

19 THE COURT: Thank you.

20 Good morning, jurors, welcome back.

21 VOICES FROM JURY BOX: Good morning.

22 THE COURT: Members of the Jury, we're about to
23 proceed with the trial of the People of the State of New
24 York versus Lonnie Harrell.

25 At the outset, I'm going to explain the various

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Opening - The Court

1 stages of the trial and what you may expect to see and hear
2 so you may better understand what is taking place. I will
3 also remind you of some basic principles of law which apply
4 to this and all criminal trials. You heard some of these
5 instructions just a few days ago, so they will sound
6 familiar.

7 At the conclusion of these instructions, I will
8 again remind you of those principles, I will define the
9 crimes charged, explain the law that applies to those
10 charged crimes and list for you the elements the People must
11 prove beyond a reasonable doubt.

12 These preliminary instructions will take about
13 thirty minutes.

14 As you can see, a court reporter is taking down
15 everything that is being said. What she takes down is
16 called the record of the trial.

17 Sometimes you will see a witness use his or her
18 hands to illustrate something. So, for example, you may see
19 a witness -- you may hear a witness say that an object was
20 this far away, indicating with their hands. You will
21 normally then hear one of the attorneys or the Court say
22 something to the effect of: Let the record reflect that the
23 witness is indicating about a foot.

24 We do that because sometimes it becomes necessary
25 to have the court reporter read back what a witness says and

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1 what a witness indicates. If someone does not state orally
2 for the record what a witness is indicating with his or her
3 hands, we may not recall what that was. Of course, you are
4 here and you can see with your own eyes and hear with your
5 own ears and you can form your own opinions.

6 The trial formally begins with what the law calls
7 an opening statement by the prosecutor. The law requires
8 the prosecutor to make an opening statement. The law,
9 however, does not require that the defendant make an opening
10 statement. If the defendant does not make an opening
11 statement, that is not a factor from which you may draw any
12 inference unfavorable to him.

13 What the lawyers say in an opening statement or at
14 any time thereafter is not evidence. The lawyers are not
15 witnesses. What I say is not evidence. I am not a witness.
16 You must decide this case on the evidence only, and please
17 remember what the lawyers say at any time is not evidence.
18 After completion of the opening statements, the prosecutor
19 will proceed with her opening -- excuse me -- with her
20 presentation of evidence.

21 I remind you that the indictment is not evidence.
22 It is simply a document that contains an accusation. The
23 defendant has pled not guilty to those accusations, and the
24 trial is for you to hear the evidence and decide whether the
25 defendant is guilty or not guilty.

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1 I remind you also that evidence is the testimony
2 of witnesses, the stipulations, if any, which are agreed to
3 by the parties and documents or other physical objects which
4 are received in evidence. Testimony is, of course, the most
5 common form of evidence and comes from the questioning of
6 the witnesses by the lawyers and perhaps by the Court.

7 A question by itself is not evidence. It is the
8 question with the answer that is evidence.

9 Next: Evidence may come in the form of a
10 stipulation. A stipulation is information which both
11 parties agree to present to the jury as evidence without
12 calling a witness to testify to that information.

13 Last: Evidence may come in the form of physical
14 objects such as documents, photographs, clothing or charts.

15 I advise you that it is common and permissible for
16 a lawyer or an investigator for a lawyer to speak to a
17 witness about his or her testimony before calling him or her
18 to the stand.

19 Also, a witness may review documents and other
20 material pertaining to the case before he or she testifies
21 at trial.

22 Generally, a witness scheduled to testify at trial
23 may not be present in the courtroom during the testimony of
24 other witnesses.

25 After the People have completed the presentation

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1 of their evidence, the defendant may, but is not required,
2 to present evidence.

3 I remind you that throughout these proceedings,
4 the defendant is presumed to be innocent. As a result, you
5 must find the defendant not guilty unless, on the evidence
6 presented at this trial, you conclude that the People have
7 proven the defendant guilty beyond a reasonable doubt. That
8 a defendant does not testify as a witness is not a factor
9 from which any inference unfavorable to the defendant may be
10 drawn.

11 The defendant is not required to prove that he is
12 not guilty. In fact, the defendant is not required to prove
13 or disprove anything. To the contrary. The People have the
14 burden of proving the defendant guilty beyond a reasonable
15 doubt. That means, before you can find the defendant guilty
16 of a crime, the People must prove beyond a reasonable doubt
17 every element of the crime, including that the defendant is
18 the person who committed that crime.

19 The burden of proof never shifts from the People
20 to the defendant. If the People fail to satisfy their
21 burden of proof, you must find the defendant not guilty.
22 And if the People satisfy their burden of proof, you must
23 find the defendant guilty.

24 The law uses the term "proof beyond a reasonable
25 doubt" to tell you how convincing the evidence of guilt must

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1 be to permit a verdict of guilty. The law recognizes that
2 in dealing with human affairs, there are very few things in
3 this world that we know with absolute certainty. Therefore,
4 the law does not require the People to prove a defendant
5 guilty beyond all possible doubt.

6 On the other hand, it is not sufficient to prove
7 that the defendant is probably guilty. In a criminal case,
8 the proof of guilt must be stronger than that, it must be
9 beyond a reasonable doubt.

10 A reasonable doubt is an honest doubt of the
11 defendant's guilt for which a reason exists based upon the
12 nature and the quality of the evidence. It is an actual
13 doubt, not an imaginary doubt. It is a doubt that a
14 reasonable person, acting in a matter of this importance,
15 would be likely to entertain because of the evidence that
16 was presented or because of the lack of convincing evidence.

17 Proof of guilt beyond a reasonable doubt is proof
18 that leaves you so firmly convinced of the defendant's guilt
19 that you have no reasonable doubt of the existence of any
20 element of the crime or of the defendant's identity as the
21 person who committed that crime.

22 In determining whether or not the People have
23 proven the defendant's guilt beyond a reasonable doubt, you
24 should be guided solely by a full and fair evaluation of the
25 evidence. After carefully evaluating the evidence, each of

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1 you must decide whether that evidence convinces you beyond a
2 reasonable doubt of the defendant's guilt.

3 Whatever your verdict may be, it must not rest
4 upon baseless speculation, nor may it be influenced in any
5 way by bias, prejudice, sympathy or by a desire to bring an
6 end to your deliberations or to avoid an unpleasant duty.

7 If you are not convinced beyond a reasonable doubt
8 that the defendant is guilty of a charged crime, you must
9 find the defendant not guilty of that crime. And if you are
10 convinced beyond a reasonable doubt that the defendant is
11 guilty of a charged crime, you must find the defendant
12 guilty of that crime.

13 Now, each witness, by whomever called, is first
14 examined, that is, they are asked questions by the lawyer
15 who calls the witness to testify. That is called direct
16 examination. When the direct examination is completed, the
17 other lawyer is permitted to ask questions of the witness.
18 And that is called cross-examination.

19 The lawyers are responsible for questioning the
20 witnesses. The Court may, at times, ask a witness a
21 question. Jurors may not ask questions of a witness.

22 You may, but are not required, to take notes. If
23 you wish to take notes, we will provide materials to you for
24 that purpose.

25 If you decide to take notes, you must follow these

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1 rules: Remember, every word of every witness is recorded by
2 the court reporter, and, during deliberations, upon your
3 request, the testimony will be read back to you in whole or
4 in part. So there is no need to take verbatim notes of a
5 witness' testimony.

6 Notes, by definition, are a brief written record
7 of something to assist the memory. A note should not take
8 precedence over your own independent recollection.

9 Remember, also, you are the finders of fact who
10 are responsible for evaluating the believability and
11 accuracy of a witness' testimony. It is, thus, important
12 that you be able to both fully comprehend what a witness is
13 saying and how the witness is saying it. Accordingly, you
14 must not permit note-taking to distract you from the
15 proceedings. If you make a note, it should be brief and not
16 distract you from what the next question and answer may be.

17 Any notes a juror takes are only for that juror's
18 own personal use in refreshing his or her recollection.
19 Thus, jurors who choose not to take notes must rely on their
20 own independent recollection and must not be influenced by
21 any notes that another juror may take.

22 Also, a juror's notes are not a substitute for the
23 recorded transcript of the testimony or for any exhibit
24 received in evidence. If, during your deliberations, there
25 is a discrepancy between a juror's recollection and his or

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1 her notes regarding the evidence, you should ask to have the
2 relevant testimony read back or the exhibit produced for
3 your inspection.

4 At the end of each trial day, until the jury
5 retires to deliberate, the notes will be collected from each
6 juror who takes notes. A juror may only refer to his or her
7 notes during proceedings and during deliberations.

8 Any notes taken are confidential and will not be
9 available for examination or review by any party or other
10 person. After the jury has rendered its evidence, we will
11 collect the notes and destroy them.

12 As judges of the facts, you alone determine the
13 truthfulness and accuracy of the testimony of each witness.
14 You must decide whether a witness told the truth and was
15 accurate, or instead, testified falsely and/or was mistaken.

16 You must also decide what importance to give to
17 the testimony you accept as truthful and accurate. It is
18 the quality of the testimony that is controlling, not the
19 number of witnesses who testify.

20 There is no particular formula for evaluating the
21 truthfulness and accuracy of another person's statements or
22 testimony. You bring to this process all of your varied
23 experiences. In life, you frequently decide the
24 truthfulness and accuracy of statements made to you by other
25 people. The same factors used to make those decisions

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1 should be used in this case when evaluating the testimony.
2 At the end of the trial, I will give you some examples of
3 those factors.

4 There are rules for all stages of the trial,
5 including rules that govern whether certain evidence may be
6 introduced, and, if so, how and when. Part of my job is to
7 enforce those rules. Some of these rules you may understand
8 when you hear the ruling, but some of them you may not
9 understand unless you've studied the law.

10 The rules have been carefully developed over
11 hundreds of years for the sole purpose of guaranteeing a
12 fair and orderly trial. The rules are not designed to
13 determine whether the evidence you hear and see is true or
14 false, accurate or inaccurate. It is for you, not for me,
15 to evaluate the evidence and make those decisions. The
16 rules are designed to insure that the evidence you hear and
17 see is relevant and in a form that permits you to evaluate
18 it fairly.

19 A witness usually can testify only about matters
20 the witness has personal knowledge of, that is, something
21 the witness has personally seen, heard, felt, touched or
22 tasted. Thus, a witness is not permitted to guess or
23 speculate or say what he or she thinks another person may
24 have heard, seen, felt, touched or tasted.

25 Also, a witness is not permitted to give an

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1 opinion to matters for which a special expertise is
2 necessary unless, of course, the witness purports to be an
3 expert on the matter he or she is being questioned about.
4 With some exceptions, what a witness may have been thinking
5 when something was taking place is not relevant evidence.

6 Finally, a witness is often not permitted to
7 testify to hearsay, meaning, generally a witness cannot
8 testify to what the witness may have said before the trial
9 or what another person may have said to that witness. But
10 there are many exceptions to the hearsay rule. For a
11 variety of sound reasons, too numerous to detail for you
12 now.

13 During the presentation of evidence, the lawyers
14 for the parties will, in turn, be asking questions of the
15 witnesses. During that questioning, a lawyer is not
16 permitted to make comments on a witness' answer or on the
17 case. That is not allowed. It is at the end of the case
18 that the lawyers are permitted to address the jurors in what
19 is called a summation, and it is then that the lawyers may
20 comment on the witnesses, the testimony and other evidence.

21 During the questioning of a witness, if a lawyer
22 believes a question or some other presentation of evidence
23 is not in accord with a rule of law, that lawyer will
24 object. That objection will be one word, objection.

25 I may then ask for the basis of the objection and

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1 the lawyer will then provide only the legal basis for the
2 objection. The lawyers will not engage in argument or
3 colloquy when they object as that could result in an unfair
4 advantage. When an objection is made, I will decide whether
5 the rules permit the question to be asked or the relevant
6 evidence to be introduced.

7 Making objections is part of a lawyer's job. You
8 are not to draw any unfavorable inference because objections
9 are made. They take place at every trial.

10 A lawyer may object before a witness answers a
11 question or after a witness answers a question. When an
12 objection is made to a question before the witness answers,
13 if I overrule the objection, the witness will be permitted
14 to answer. If I sustain the objection, there is no answer
15 and, therefore, no evidence. Remember, the question alone
16 is not evidence.

17 If the lawyer objects after the witness has
18 answered the question and I overrule the objection, the
19 answer stands as evidence. If I sustain the objection, the
20 answer is not evidence, the question and answer are stricken
21 from the record and you are to completely disregard the
22 answer.

23 Sometimes when I sustain an objection an answer
24 may have been inadvertently given. In that case, whether or
25 not I formally say the question and answer are stricken from

Joanne Fleming

1 the record, you must disregard them. I tell you now that
2 the question and answer are stricken from the record and you
3 are to completely disregard them as though they were never
4 said.

5 Also, the Court has an obligation under the laws
6 of New York to make sure that certain fundamental rules of
7 law are followed even if one of the lawyers does not voice
8 an objection. So, on occasion, you may hear me say
9 sustained, or words to that effect, even though no lawyer
10 has actually voiced an objection. Any ruling by the Court
11 on an objection of counsel or otherwise is based on our law
12 and expresses no opinion about the facts of the case or
13 whether the defendant is guilty or not guilty.

14 Upon completion of the presentation of evidence,
15 the lawyers will address you in a closing statement or what
16 the law calls a summation. What a lawyer says in summation
17 is not evidence. The summations, however, provide each
18 lawyer an opportunity to review the evidence presented and
19 submit, for your consideration, the facts, inferences and
20 conclusions which they contend may be properly drawn from
21 the evidence.

22 After summations are concluded, I will instruct
23 you on the rules of law applicable to the case. You must
24 accept and follow those rules. You will then begin your
25 deliberations.

Joanne Fleming

1 During your deliberations, your function as jurors
2 will be to decide what the facts are and to apply the rules
3 of law that I set out. You will determine what the facts
4 are from all the testimony that you hear, the exhibits that
5 are submitted and any stipulations the parties have agreed
6 to. The conclusion you reach from determining the facts and
7 applying the law will be your verdict, guilty or not guilty.

8 Under our law, Juror Number 1 will serve as the
9 foreperson. During the trial, the foreperson has the same
10 responsibilities as any other juror except that during
11 deliberations, the foreperson will sign any note that the
12 jury sends to me, including that the jury has reached a
13 verdict. The foreperson will also announce the jury's
14 verdict.

15 Thus, in sum, the stages of a criminal trial are:
16 The opening statements, the presentation of evidence,
17 summations, the final instructions of the Court to the jury
18 on the law and the deliberations of the jury and the
19 verdict.

20 During the trial, if you need to speak with me
21 about something relating to your jury service or the trial,
22 please tell a court officer that you need to speak to me. I
23 will arrange a meeting with the parties here in the
24 courtroom.

25 Do not discuss with your fellow jurors whatever

Joanne Fleming

1 you feel necessary to bring to my attention, and after we
2 have had our conversation, please do not discuss with your
3 fellow jurors whatever it is that we discussed.

4 During a trial, we do our best to avoid delays.
5 But, from experience, I know delays are inevitable for a
6 multitude of reasons through no one's deliberate fault.
7 When those delays occur, I ask for your understanding and
8 patience.

9 I also ask that you be here at the times I set so
10 that the absence or lateness of a juror is not the occasion
11 for the delay. As I previously explained, we can conduct no
12 business until every single juror is here, including the
13 alternate jurors. Thus, it is as necessary that the last
14 juror be as on time as the first juror.

15 If an emergency arises that will make you late or
16 prevent you from attending, please call the Court, leave a
17 number where you can be reached and explain the problem so
18 that we can minimize everyone's inconvenience.

19 In this trial, we have four alternate jurors. An
20 alternate juror is expected to pay the same close attention
21 to the case as any one of the first twelve jurors. The only
22 difference between an alternate juror and one of the first
23 twelve jurors is that the alternate juror does not know at
24 this time whether that juror will be called upon at some
25 point during the trial to substitute for one of the trial

Joanne Fleming

1 jurors. That substitution can take place only if an
2 unforeseen and extraordinary emergency arises that makes it
3 totally impossible for one of the first twelve jurors to
4 complete the trial.

5 Our law expects that the first twelve jurors who
6 begin the trial will be the twelve jurors who complete the
7 trial. So, it takes an extraordinary emergency before there
8 may be a substitution of an alternate.

9 Finally, our law requires jurors to follow certain
10 instructions in order to help insure a just and fair trial.
11 I am required to give the following admonitions which you
12 are going to hear numerous times during the course of this
13 trial:

14 First: Do not talk either among yourselves or
15 with anyone else about anything relating to the case. You
16 may tell the people with whom you live and your employer
17 that you are a juror and give them information about when
18 you will be required to be in court, but you may not talk
19 with them or anyone else about anything related to the case.

20 Do not at any time during the trial request,
21 accept, agree to accept or discuss with any person, the
22 receipt or acceptance of any payment or benefit in return
23 for supplying any information concerning the trial.

24 You must promptly report directly to me any
25 incident within your knowledge involving an attempt by any

Joanne Fleming

1 person improperly to influence you or any member of the
2 jury.

3 Do not visit or view the location where the
4 charged crime was allegedly committed or any other premises
5 or place involved in the case.

6 And you must not use Internet maps, Google Earth
7 or any other program or device to search for and view any
8 location discussed in the testimony.

9 Keep an open mind and refrain from reaching any
10 conclusions or decisions until all of the evidence is in, I
11 have instructed you on the law and I have directed you to
12 begin your deliberations.

13 Although I do not expect any media coverage of
14 this case, please do not read, view or listen to any
15 accounts or discussions of the case reported by newspapers,
16 television, radio, the Internet or any other news media.

17 Do not attempt to research any fact, issue or law
18 related to this case whether by discussion with others, by
19 research in a library or on the Internet, or by any other
20 means or source.

21 I want to emphasize that in addition to not
22 talking face to face with anyone about the case, you must
23 not communicate with anyone by any other means, including by
24 telephone, text messages, e-mail, Internet chatrooms, blogs
25 or social websites.

Joanne Fleming

1 You must also not Google or otherwise search for
2 any information about the case or the law which applies to
3 the case or the people involved in the case, including the
4 defendant, the witnesses, the lawyers or myself.

5 As I mentioned yesterday, if you happen to see me
6 or any of the attorneys in the hallways or other public
7 places and we do not acknowledge you, please do not take
8 offense. We are prohibited from engaging you during the
9 course of the trial, and, in an excess of caution, we will
10 avoid talking to you or even greeting you. I know you
11 understand that we're only trying to comply with our ethical
12 obligations and avoid even the appearance of impropriety.

13 Now, I want you to understand why these rules are
14 so important. Our law does not permit jurors to talk with
15 anyone about the case or permit anyone to talk to you about
16 the case because only jurors are authorized to render a
17 verdict. Only you have been found to be fair. And only you
18 have promised to be fair. No one else has been so
19 qualified.

20 Our law does not permit jurors to talk among
21 themselves about the case until the Court tells them to
22 begin deliberations because premature discussions can lead
23 to a premature final decision.

24 Our law does not permit you to visit the place
25 discussed in the testimony because you cannot always be sure

Joanne Fleming

Opening - The Court

1 that the place is in the same condition as it was on the day
2 in question, and even if it were in the same condition, once
3 you go to a place discussed in the testimony to evaluate the
4 evidence in light of what you see, you become a witness, not
5 a juror. As a witness, you may now have an erroneous view
6 of the scene that may not be subject to corrections by
7 either party. That would not be fair.

8 Finally, our law requires that you not read or
9 listen to any news accounts of the case and that you not
10 attempt to research any fact, issue or law related to the
11 case. Your decision must be based solely on the testimony
12 and other evidence presented in this courtroom. It would
13 not be fair to the parties for you to base your decision on
14 a reporter's view or opinion or upon information you acquire
15 outside of the courtroom.

16 These rules are designed to help guaranty a fair
17 trial and our law, accordingly, sets forth serious
18 consequences if the rules are not followed. I know you
19 understand and appreciate the importance of following these
20 rules, and, in accord with your oath and promise, I know you
21 will do so.

22 Notebooks will be handed out after the opening
23 statements.

24 Having concluded my preliminary instructions, I
25 will now ask Assistant District Attorney Park to deliver her

Joanne Fleming

1 opening statement.

2 Ms. Park.

3 MS. PARK: She was just fifteen-years old. He was
4 fifty-one. She was just a child and he was an adult. They
5 were not equals. He was bigger than she was. He was so
6 much older than she was. He was three times her years.
7 This wasn't supposed to happen. It was a crime and it was a
8 horrific one.

9 It was the summer of 2014, Cypress Smith had just
10 turned fifteen in April of that year. She had just finished
11 her freshman year of high school and she goes to a boarding
12 school outside of New York.

13 After the school year ended, she spent about two
14 weeks in Montana working on a service project. After she
15 was done with that, she was home where she lived with her
16 mother and her younger brother when she was not in school
17 and that home was at Ninety-Two St. Nicholas Avenue here in
18 Manhattan.

19 Lonnie Harrell was fifty-one years old. He lived
20 on the same floor as Cypress and her family. He did some
21 maintenance work around the building, so the family knew the
22 defendant well.

23 On July 16th of 2014, Cypress was home. She had
24 gotten up late, probably sometime after twelve, close to
25 one. She decided to make herself some lunch. She was home

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Opening - The People

1 alone. It was a weekday, a Wednesday. Her mother had
2 already left for work and her younger brother, Journey,
3 who's thirteen at the time, he had gone to The Boys' Club.

4 So, she was home alone. She decided to make a
5 sandwich and a Smoothie. She turns on the blender. After
6 she finished making lunch, she heard a knock at the door.
7 She went to see who it was and it was the defendant. She
8 recognized his voice. She knew who he was because she ran
9 into him often. Whenever she was home with her mother, she
10 would see him.

11 She noticed -- when she opened the door, she
12 noticed that he stood in the doorway. He was holding a
13 coffee cup. He asked her if her brother was home, that he
14 wanted to go for a bicycle ride. You see, Journey and the
15 defendant spent more time together because Journey actually
16 lived at that address with his mother. So they would go
17 bicycle riding together. They spent time together.

18 Cypress told the defendant that her brother wasn't
19 home, and defendant said: I heard the blender, heard you
20 making a Smoothie, can I have some? And Cypress said: Yes,
21 and invited him inside.

22 He came in and brought in with him that coffee
23 cup. And this will become significant later on. He threw
24 the coffee cup in the kitchen garbage can. She handed him a
25 glass of Smoothie with a straw, which will also become

Joanne Fleming

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1 significant later on.

2 She took her lunch and they all moved to the
3 living room. She sat down, he sat down, and they began
4 talking. He asked her about school and they talked for
5 about fifteen minutes.

6 After they were done, she took the glass -- the
7 glasses with the Smoothie, when they finished, back to the
8 kitchen, put it on the kitchen counter. She came back and
9 she told him it's time to go, I have to clean up.

10 He got up. As they were walking, he reached out
11 to give her a hug. To Cypress, up until that moment,
12 nothing seemed unusual. Nothing happened that caused her to
13 be alarmed. She had seen the defendant before and she knew
14 him. She trusted him. So, she returned the hug. They were
15 friendly. In all the years that she had known the
16 defendant, nothing warned her about what was about to
17 happen.

18 Defendant held on to Cypress. He didn't let her
19 go out of that hug. She got scared. She tried to struggle
20 out of the embrace. She squirmed but it didn't work, he
21 held onto her. She kicked him on his shin. Still didn't
22 work.

23 He then put his hands around her throat. He
24 squeezed, he choked her, took her down to the ground,
25 covered her mouth, told her not to scream. He threatened:

Joanne Fleming

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Opening - The People

1 If you scream, I'm going to hurt you.

2 He then pulled her by her hair, pulled her into
3 the room that was adjacent to the living room, the room that
4 you will hear Cypress refer to as The Learning Center, and
5 she calls it The Learning Center because that's where her
6 and Journey, her brother, used to do their homework.

7 He drags her into that room. He tells her to sit
8 on the chair and she complies. He forced his mouth onto her
9 mouth. He kissed her. He then pulled down her shorts, her
10 underwear, placed his fingers inside of her vagina. She
11 said it hurt. She was in pain. She begged him to stop. He
12 continued. He didn't care.

13 He pulled out his penis and then rubbed his penis
14 against her naked vagina, not penetrating her, but coming so
15 close to it. She was still crying, pleading with him:
16 Please don't do this. Defendant threatened that if she
17 didn't comply, I'm going to hurt you and your mother.

18 He then performed oral sex on her by putting his
19 mouth on her vagina, and afterwards, he ordered her to stand
20 up and to get on her knees. She said no. He then grabbed
21 her hair, pushed her down, put her on her knees and forced
22 his penis inside her mouth, eventually ejaculating inside of
23 her mouth.

24 Cypress spit out the ejaculate onto her underwear
25 that the defendant had taken off earlier. Defendant grabbed

Joanne Fleming

A379

Opening - The People

1 the underwear, wiped himself and wiped the floor that was in
2 front of Cypress, and then he put that underwear in his
3 pocket and told her that he was going to keep it.

4 Defendant told her to go back into the living
5 room. Cypress, who at this point is terrified, scared, did
6 as she was told. She walked into the living room still
7 naked from the waist down. She tried to pull down her shirt
8 to cover herself.

9 And when she got into the living room, she sat
10 down on the chair. Defendant told her to remove her hands,
11 took out his phone, took pictures of her. He told her: If
12 you tell anyone about what happened, I am going to show
13 these pictures to people and they will know what you did.

14 He then asked for Cypress' phone number. Afraid
15 that he would call her to make sure that she gave him the
16 accurate phone number, she gave him her number, and, in
17 fact, he did as expected, he did call her number. Satisfied
18 that she had given him the accurate number, the defendant
19 left the apartment. He left with the -- with Cypress'
20 underwear and with his phone, not wanting to leave any
21 evidence behind. And you will see phone records that
22 corroborate the defendant calling Cypress.

23 What defendant will learn is that Cypress' words
24 and her body will later be evidence of the sexual assault.
25 As soon as the defendant left, Cypress called Nine-One-One

Joanne Fleming

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Opening - The People

1 and you will hear that call. You will hear the fear in her
2 voice, how she begs the Nine-One-One operator to please,
3 please, don't put on the sirens, afraid that the defendant
4 will hear the sirens and come and hurt her.

5 The police got there immediately and spoke to
6 Cypress about what happened. One of the officers called
7 Cypress' mother and Cypress' mother left work immediately,
8 desperate to be by her daughter's side.

9 After Ms. Smith got home, she accompanied Cypress
10 to the hospital, St. Luke's Roosevelt Hospital, that same
11 day. There, a doctor conducted an examination and collected
12 evidence from Cypress. She swabbed certain areas of her
13 body, primarily her mouth, inside of her mouth, and her
14 vaginal area in an attempt to collect DNA evidence and
15 prepare what is commonly known as a rape kit.

16 The rape kit was tested by criminalists from the
17 Office of the Chief Medical Examiner, Department of Forensic
18 Biology, and you will learn that there was DNA consistent
19 with that of the defendant, not a full match, and you will
20 learn the difference when the criminalist testifies.

21 While the police were -- now going back to the
22 apartment, while the police were still in the apartment,
23 they recovered that glass with the straw that the defendant
24 had earlier drank from and that coffee cup that he threw out
25 in the garbage can, that same coffee cup the defendant had

Joanne Fleming

Opening - The People

1 with him when he first came into the apartment. The straw
2 and the coffee cup, again, were swabbed in an attempt to
3 collect DNA evidence and you will learn that the DNA from
4 those swabs matched that of the defendant's DNA.

5 Defendant was not caught that day. He fled from
6 his apartment and he would not be caught for another two
7 months. You will hear from Detective Susan Barbato, who was
8 assigned to this investigation, she was a detective from the
9 Special Victims Squad, and she began the investigation, and
10 on September 10th of 2014, the defendant turned himself into
11 the police, he was arrested.

12 You're also going to see cell sites for the
13 defendant's phone, the phone that he used to call Cypress to
14 make sure that she gave him the correct number. Cell sites
15 which -- that tells you the general vicinity of where that
16 cell phone is coming from. And the cell site records will
17 show you that immediately after the incident, the defendant
18 fled his home.

19 Cypress Smith was only fifteen-years old at the
20 time of this incident. She was attacked by a fifty-year old
21 man, the man sitting over there. She let him into her
22 apartment because she trusted him and he violated that trust
23 in every way. He violated her body and her sense of
24 security in her own home. She will never regain the
25 innocence that she lost on July 16th of 2014.

Joanne Fleming

1 And while this trial is not a lengthy one, you may
2 hear some of the witnesses out of order, and that's to
3 accommodate some of the witnesses' schedule and also to make
4 most of your time, but I hope that what I have just laid out
5 for you will give you the guideline as to what the evidence
6 will show in this case. And, at the end of the case, I will
7 come back to you and ask you to find the defendant guilty
8 because the evidence will prove his guilt.

9 Thank you.

10 THE COURT: Thank you, Ms. Park.

11 Mr. Herlich.

12 MR. HERLICH: Yes.

13 Good morning, everyone.

14 VOICES FROM JURY BOX: Good afternoon.

15 MR. HERLICH: As you may know, the prosecution is
16 required to tell you what they intend to prove at a trial.
17 That is consistent with the fact that the burden of proof
18 rests on their shoulders.

19 I will reserve most of my comments on the evidence
20 to the concluding arguments because, like you, I haven't
21 heard the People's case yet, but there is a couple of things
22 I wanted to discuss with you before we begin. I think it
23 would be important to just lay out the charges for you so
24 you're clear what they are. So I'll, in part, read from the
25 indictment.

Joanne Fleming

Opening - The Defense

1 The first two counts are criminal sexual act in
2 the first degree, and one accuses my client, Mr. Harrell, of
3 contact between his mouth and the vulva of Cypress Smith,
4 and the other count accuses Mr. Harrell of contact between
5 his penis and the mouth of Cypress Smith.

6 And both of those counts require forcible
7 compulsion as an element of the crime. And I'm telling you
8 now that Mr. Harrell intends to testify in this case, that
9 he's contending that he did not use force or forcible
10 compulsion in this case and that it was a consensual act
11 that occurred between himself and Cypress Smith. Those are
12 the first two counts.

13 The third count is attempted rape in the first
14 degree where the accusation is Mr. Harrell attempted to have
15 sexual intercourse with Cypress Smith by forcible
16 compulsion.

17 The fourth and fifth counts are called sexual
18 abuse in the first degree, and the first of those two
19 counts, count number four, accuses Mr. Harrell on July 16th
20 of 2014 with having contact between his finger and the
21 vagina of Cypress Smith by forcible compulsion.

22 And the fifth count, sexual abuse in the first
23 degree, alleges that Mr. Harrell had contact between his
24 mouth and the mouth of Cypress Smith; in other words, by
25 forcible compulsion, he kissed her.

Joanne Fleming

Opening - The Defense

1 The last two counts have something much in common
2 with the first two counts except there's no allegation of
3 forcible compulsion.

4 Count six and seven, again, allege contact between
5 my client's mouth and the vulva of Cypress Smith and contact
6 between my client's penis and the mouth of Cypress Smith.
7 There's no allegation or legal element regarding forcible
8 compulsion. The element that the People must prove is that
9 my client was twenty-one years of age or older and that at
10 the time of this event Cypress Smith was less than
11 seventeen-years old, what we've called statutory rape. And
12 those two counts are called criminal sexual act in the third
13 degree.

14 One reason I wanted to read you what the charges
15 are is because I want you to know that the legal
16 instructions defining these crimes, the elements of the
17 crimes in this case, will come to you from Justice Merchan,
18 and you're not to use your common sense notions of certain
19 words or terms but to take the law from the Judge, and the
20 reason I say that is because the medical records that will
21 come into evidence in this case refer to the words rape.

22 You've heard the prosecutor, in her opening
23 statement, mention the rape kit which is properly called
24 Sexual Assault Forensic Examination, SAFE Kit. Sexual abuse
25 is a term that is used in the medical records, and on the

Joanne Fleming

Opening - The Defense

1 Nine-Eleven call, I believe the first thing that Cypress
2 Smith says is: I was raped. Well, my client's not even
3 charged with rape as a completed crime.

4 See, I just want to point out to you that the law
5 will come from the Judge, and the way it appears to me in
6 terms of the Nine-Eleven call, or the allegations in the
7 medical records, is the complaining witness' obviously
8 contending that there was a sexual assault.

9 Whether there was a rape or an attempted rape or
10 sexual abuse in this case is obviously something you're
11 going to have to decide during the course of your
12 deliberations, but the terms come from the Judge, and when
13 you see the terms bantered about in the medical records,
14 rape and sexual abuse, I'm asking you to disregard the
15 common sense term, in effect, it means sexual assault, but
16 the words are important because those are the words charged
17 in this indictment and will be defined to you by Justice
18 Merchan at the end of the case.

19 I will leave it at what I said during the voir
20 dire: The People have to prove their case beyond a
21 reasonable doubt. If they fail to do so, then you must find
22 the defendant not guilty of those charges.

23 Thank you.

24 THE COURT: Thank you, Mr. Herlich.

25 Jurors, before we hear from our first witness,

Joanne Fleming

1 let's take a short recess. Let's take ten or fifteen
2 minutes.

3 Please remember the instructions I just gave you.
4 You can step out.

5 A COURT OFFICER: All rise.

6 (Whereupon, the jury exited the courtroom.)

7 A COURT OFFICER: You can be seated.

8 THE COURT: Okay, Ms. Park, you will speak to your
9 witness at this time?

10 MS. PARK: Yes.

11 THE COURT: Thank you.

12 (Whereupon, a recess was taken.)

13 THE CLERK: Continuing case on trial, People
14 versus Lonnie Harrell.

15 A COURT OFFICER: One coming in.

16 (Whereupon, the defendant entered the courtroom.)

17 THE COURT: Okay, bring the jurors in, please.

18 A COURT OFFICER: Jury entering.

19 (Whereupon, the jury entered the courtroom.)

20 THE CLERK: Continuing case on trial, People
21 versus Lonnie Harrell.

22 All parties and all jurors are present.

23 THE COURT: Jurors, please raise your hand if you
24 would like writing materials?

25 (Jurors indicating.)

Joanne Fleming

1 THE COURT: Please keep your hands up, thank you.

2 (Jurors indicating.)

3 THE CLERK: (Hanging.)

4 THE COURT: Okay, anybody else?

5 (Jurors indicating.)

6 THE CLERK: (Hanging.)

7 THE COURT: Thank you.

8 People, please call your first witness.

9 MS. PARK: The People call Cypress Smith.

10 A COURT OFFICER: Witness entering.

11 (Whereupon, the witness entered the courtroom.)

12 A COURT OFFICER: Please remain standing, raise

13 your right hand and face the clerk.

14 C Y P R E S S S M I T H, called as a witness, by and on
15 behalf of the People at the Trial, having been duly sworn
16 or affirmed, testified as follows:

17 THE CLERK: Thank you.

18 A COURT OFFICER: Please be seated. Pull your
19 chair up.

20 In a loud, clear voice, state your full name,
21 spelling your last name, and county you reside.

22 THE WITNESS: Cypress Smith, S-M-I-T-H.

23 What else?

24 A COURT OFFICER: The county you reside.

25 THE WITNESS: New York.

Joanne Fleming

C. Smith - People - Direct

1 A COURT OFFICER: That's fine.

2 THE COURT: Okay.

3 Good morning, Ms. Smith.

4 THE WITNESS: Good morning.

5 THE COURT: You may inquire.

6 DIRECT EXAMINATION

7 BY MS. PARK:

8 Q Can you please tell the jury your full name?

9 A Cypress Eden Smith.

10 Q How old are you?

11 A Sixteen.

12 Q What is your date of birth?

13 A April 21st, 1999.

14 Q Are you in school?

15 A Yes.

16 Q What grade are you in in school?

17 A Eleventh.

18 Q Do you go to school outside of New York?

19 A Yes.

20 Q What state is that?

21 A Massachusetts.

22 Q Do you live there in Massachusetts while you're in
23 school?

24 A Yes.

25 Q When did you start there?

Joanne Fleming

C. Smith - People - Direct

1 A My freshman year.

2 Q So this would be your junior year?

3 A Yes.

4 Q And do you come to New York during the school year?

5 A Yes.

6 Q When do you come to New York?

7 A For major breaks.

8 Q Like what?

9 A Like Thanksgiving, Christmas, winter -- spring break
10 and summer.

11 Q What do you plan on doing after you finish high
12 school?

13 A Hopefully college.

14 Q Did you already start your school year this year?

15 A Yes.

16 Q Are you missing school days because of this trial?

17 A Yes.

18 Q When did you come to New York?

19 A On Saturday.

20 Q How did you come here?

21 A On a train.

22 Q How long is your train ride, about?

23 A Four hours, maybe.

24 Q Are you going back to school as soon as you're
25 finished here?

Joanne Fleming

1 A Yes.

2 Q Cypress, I want to focus your attention to last summer
3 of 2014.

4 What grade did you complete at that point?

5 A Ninth.

6 Q Ninth?

7 A Yes.

8 Q And that would be freshman, right?

9 A Yes.

10 Q What month was school finished?

11 A June.

12 Q What did you do after school finished?

13 A I went on a service trip to Montana for two weeks.

14 Q Can you just briefly tell us what you did?

15 A It was a cultural immergent and service program. So,
16 the group and I built sheds on a Native American reservation,
17 and we volunteered at a senior center and a day-care center as
18 well.

19 Q About how long was the program?

20 A Two weeks.

21 Q Did you complete the program?

22 A Yes.

23 Q What did you do after?

24 A I came back to New York and I started unpacking and
25 repacking to go to camp.

Joanne Fleming

1 Q When you came to New York, where was that, the
2 address?

3 A Oh, Ninety-Two St. Nicholas.

4 Q And what apartment?

5 A Two G.

6 Q Is that here in Manhattan?

7 A Yes.

8 Q And who lived with you at that time?

9 A My mother, my brother and what is my mother's now
10 husband.

11 Q You mentioned a brother.

12 A Yes.

13 Q What is his name?

14 A Journey Smith.

15 THE COURT: Sorry, what is his name?

16 THE WITNESS: Journey Smith.

17 THE COURT: Thank you.

18 Q How old is your brother?

19 A He's fourteen.

20 Q He's fourteen now?

21 A Yes.

22 Q And do you recall about when it was that you came back
23 home to your mother's apartment after the Montana project?

24 A Could you repeat the request?

25 Q Do you know when it was, about?

Joanne Fleming

1 A I don't remember.

2 Q Was that in July?

3 A Yes.

4 Q Do you remember if it was before or after the 4th of
5 July holiday?

6 A After.

7 Q And when were you supposed to return to school?

8 A August 30th.

9 Q I'm sorry, August?

10 A Thirtieth.

11 Q What was your plan for the rest of the summer?

12 A I was going to a camp for three and a half weeks.

13 Q And when were you going to go away for that camp?

14 A About a week after I came back from Montana.

15 Q So, just to be clear, you were going to be home for
16 about a week and staying with your mother, is that right?

17 A Yes.

18 Q I want to direct your attention to July 16th of 2014.

19 Were you at home with your mother?

20 A I was at home but not with my mother, though.

21 Q I'm sorry, yes.

22 But you were living with your mother at that time?

23 A Yes.

24 Q What about your father, where was he?

25 A He's in Georgia.

Joanne Fleming

C. Smith - People - Direct

1 Q Was he in Georgia back then?

2 A Yes.

3 Q Do you know what day July 16th was?

4 A Yes.

5 Q What day was it?

6 A Wednesday.

7 Q Do you know a man named Lonnie Harrell?

8 A Yes.

9 Q Who is he?

10 A He did maintenance around the building.

11 Q Around what building?

12 A The building I live in.

13 Q Ninety-Two St. Nicholas?

14 A Yes.

15 Q About how long have you known him?

16 A Couple of years.

17 Q When you say a "couple of years," what do you mean?

18 A Two to three or so.

19 Q Do you know where he lived?

20 A I assume with his mother in the apartment next to
21 mine.

22 Q I'm sorry?

23 A In the apartment next door with his mother.

24 Q Do you know what apartment number that is?

25 A Two H.

Joanne Fleming

C. Smith - People - Direct

1 Q And did you see him when you came home when you were
2 not in school?

3 A Yes.

4 Q About how often would you say you saw him prior to
5 July 16th?

6 A Couple of times a week.

7 Q And can you describe for us, prior to July 16th, what
8 kind of relationship you had with him?

9 A Friendly, familiar, cordial.

10 Q When you saw him, did you speak to him?

11 A Yes.

12 Q What kinds of things would you two talk about?

13 A School, things like that.

14 Q Prior to July 16th of 2014, do you remember the last
15 time that you had seen him?

16 A No.

17 Q How did you refer to him?

18 A Lonnie.

19 Q Did you know his last name back then?

20 A No.

21 Q Did you only know him as Lonnie?

22 A Yes.

23 Q At this time, in a moment, I'm going to ask you to
24 take a look around the courtroom, and then please tell us if
25 you see Lonnie in the courtroom today and can you describe --

Joanne Fleming

1 point to him and describe something that he's wearing? Can you
2 do that now?

3 A Black shirt.

4 MS. PARK: Judge, if the record can reflect that
5 the witness looked over in the defendant's direction and has
6 identified the article of clothing that he's wearing?

7 THE COURT: Yes.

8 Q Now, I want to focus your attention again to July 16th
9 of 2014.

10 You said you were home?

11 A Yes.

12 Q About what time did you wake up?

13 A Around noon, closer to one.

14 Q Was anyone home when you woke up?

15 A No.

16 Q Do you know where everybody went?

17 A Yes.

18 Q Where did they go?

19 A My mother was at work and my brother was at The Boys'
20 Club.

21 Q How do you know that?

22 A Because my mom goes to work every weekday and during
23 the summer my brother went to The Boys' Club.

24 Q After you got up, what did you do?

25 A I went in the kitchen and I made a sandwich.

Joanne Fleming

C. Smith - People - Direct

1 Q What did you make?

2 A Grilled cheese.

3 THE COURT: Ms. Smith --

4 Q Did you make anything else?

5 THE COURT: -- can you pull the microphone to your
6 mouth and perhaps speak up a little bit?

7 THE WITNESS: Sure, sorry.

8 THE COURT: I appreciate it.

9 THE WITNESS: Is this better?

10 THE COURT: Yes, thank you.

11 THE WITNESS: Sorry, go ahead.

12 Q You said you made a grilled cheese sandwich?

13 A Yeah.

14 Q Did you make anything else?

15 A A Smoothie.

16 Q How did you do that?

17 A With a blender.

18 Q Were you home alone at that point?

19 A Yes.

20 Q And what happened after you made what you just talked
21 about?

22 A I turned on the T.V. and I went to watch T.V. and I
23 heard a knock at the door.

24 MS. PARK: I think you might have to raise the
25 microphone just a little bit.

Joanne Fleming

1 THE WITNESS: Okay.

2 Is this okay now?

3 MS. PARK: Yes, yes.

4 THE WITNESS: Okay, sorry.

5 Q Now, can you tell us what you did after you prepared
6 lunch?

7 A I turned on the T.V., and I went to sit down in the
8 living room and then I heard a knock at the door.

9 Q What did you do when you heard the knock at the door?

10 A I asked who it was.

11 Q Were you expecting anyone?

12 A No.

13 Q And when you asked who it was, were you still inside
14 your apartment?

15 A Yes.

16 Q Did you open the door at that point?

17 A No, I -- I went in my room to grab a sweater, I think.

18 Q And when you asked who it was, did you hear any voice
19 coming from outside of the door?

20 A Yes.

21 Q And what happened?

22 A He said it was Lonnie and I recognized the voice so I
23 opened the door.

24 Q I'm sorry? You recognized his voice?

25 A Yes.

Joanne Fleming

1 Q And then?

2 A I opened the door.

3 Q Now, you mentioned you went into your room.

4 A Yes.

5 Q At what point did you go into your room?

6 A I think after I asked who it was.

7 Q And then you went into your room?

8 A Yes.

9 Q Had you opened the door at that point?

10 A No.

11 Q And why did you go into your room?

12 A I don't remember.

13 Q What were you wearing at that time?

14 A Pajamas.

15 Q Can you describe the pajamas you were wearing?

16 A Red shorts and a pink tee, tee shirt, I think.

17 Q And did you put anything on when you went to your
18 room?

19 A I think so, yeah.

20 Q What did you do?

21 A I think I put on a bra.

22 Q And then what happened?

23 A And I answered the door and Lonnie asked if my brother
24 was home.

25 Q When you say you answered the door, do you mean you

Joanne Fleming

1 opened it?

2 A Yes.

3 Q And who was on the other side?

4 A Lonnie was.

5 Q And what happened?

6 A He asked me if my brother was home because there were
7 bikes downstairs and he wanted to go for a bike ride.

8 Q And what, if anything, did you say?

9 A I said that he wasn't home yet but he would be soon.

10 Q And then what happened?

11 A And then Lonnie asked -- he said that he heard the
12 blender outside, and I said I made a Smoothie and he asked to
13 come in and have some. So I said yes.

14 Q And then what happened after you said yes?

15 A He came inside and he threw away the coffee cup he had
16 been holding.

17 Q So tell us about this coffee cup.

18 A It was blue and paper and it had white writing on it.

19 Q When did you first notice this coffee cup?

20 A When I answered the door.

21 Q Was he holding it?

22 A Yes.

23 Q So, after he had come in, what did he do with that
24 coffee cup?

25 A He threw it away.

Joanne Fleming

A400

1 Q Where?

2 A In the trash can in the kitchen.

3 Q Prior to that date, has the defendant, Lonnie, has he
4 ever been inside your apartment before while you were there?

5 A Yes.

6 Q About when was that?

7 A Many times before, doing maintenance work sometimes.

8 Q And when he asked you for some Smoothie, did you think
9 -- what did you think?

10 A I didn't think much of it. I was just being friendly.

11 Q I'm sorry?

12 A I didn't think much of it. I just thought he was
13 being friendly.

14 Q And after he threw the coffee cup in your garbage can,
15 what happened next?

16 A I gave him a cup and I poured some of the Smoothie in
17 it and I gave him a straw, and I sat down in the living room
18 and he sat across from me.

19 Q And you mentioned you gave him a cup with a straw?

20 A Yes.

21 Q Do you remember the color of the straw?

22 A Yes.

23 Q What color was it?

24 A Purple.

25 Q At this point I'm going to show you what I've

C. Smith - People - Direct

1 previously marked for identification as People's Exhibits 1
2 through 9.

3 THE SERGEANT: (Handing.)

4 Q I'm just going to ask you to look at all of the
5 pictures that's in front of you and just look up when you're
6 done.

7 A (Witness complies.)

8 Q Do you recognize People's 1 through 9?

9 A Yes.

10 Q What are they?

11 A Pictures of my apartment.

12 Q Do they fairly and accurately show the layout of the
13 inside of your apartment --

14 A Yes.

15 Q -- on July 16th, 2014?

16 A There is a different couch now.

17 Q Okay.

18 Other than the different couch, is the layout the
19 same?

20 A Yes.

21 MS. PARK: Your Honor, at this time I offer
22 People's 1 through 9 into evidence.

23 MR. HERLICH: Just brief voir dire, your Honor?

24 THE COURT: Yes.

25

Joanne Fleming

1 VOIR DIRE EXAMINATION

2 BY MR. HERLICH:

3 MR. HERLICH: Do you happen to know when the
4 photographs were taken?

5 THE WITNESS: I assume recently but I don't
6 exactly know when.

7 MR. HERLICH: And, in addition to the photographs
8 of the apartment, are there any photographs of you in there?

9 THE WITNESS: No.

10 THE COURT: Any objection?

11 MR. HERLICH: No.

12 THE COURT: There being no objection, People's 1
13 through 9 are accepted into evidence.

14 (Received and marked as People's Exhibit Numbers 1
15 through 9 in evidence.)

16 MS. PARK: May I publish?

17 THE COURT: Yes.

18 CONTINUED DIRECT EXAMINATION

19 BY MS. PARK:

20 Q So, I'm just going to ask you to look at the screen
21 that's right behind you.

22 You see that?

23 A Yes.

24 Q You can turn your chair around if that's easier.

25 A (Witness complies.)

Joanne Fleming

A403

1 Q And I'm going to go through each one and just tell us
2 what we're looking at.

3 This is People's Exhibit 1.

4 A That's the hallway of my apartment.

5 Q So, in the center of the photograph there is a door.
6 Is that the door, main door, that leads into your apartment?

7 A Yes.

8 Q And where is your room?

9 A My room is to the immediate right of it.

10 Q So there is a door that appears right next to that
11 center door to the right of it if you're looking at the
12 photograph.

13 Is that your room?

14 A Yes.

15 Q I'm showing you People's 2.

16 What is this?

17 A It's the hallway and entrance to the kitchen.

18 Q And can you tell us where the entrance to the kitchen
19 is in this picture?

20 A It's where the trash can is.

21 Q So, if you're looking at the photograph on the lower
22 left-hand corner there is a trash can. Is that the entrance to
23 the kitchen?

24 A Yes.

25 Q People's 3.

C. Smith - People - Direct

1 A That's the kitchen looking out into the hallway.

2 Q And looking at People's 3, can you show us where the
3 defendant threw out the coffee cup?

4 A In the red trash can next to the refrigerator.

5 Q People's 4.

6 A That's the kitchen from the doorway of the kitchen.

7 Q So this would be looking into the kitchen from the
8 hallway, right?

9 A Yes.

10 Q And People's 5.

11 A That's the kitchen counter and sink.

12 Q People's 6?

13 A It's the living room and the kitchen --

14 MR. HERLICH: I didn't hear you.

15 A It's the living room and the kitchen from The Learning
16 Center. It's where my brother and I used to do homework.

17 Q Is that what you call that room, The Learning Center?

18 A Yes.

19 Q And I want you to look at the picture, kind of the
20 center. Little bit towards on the left side there is a grayish
21 brownish couch there. Was that there on July 16th of 2014?

22 A No.

23 Q So, can you tell us what was there back then?

24 A There was a red couch underneath the circular mirror,
25 and there was a big black recliner that sat across from it and

Joanne Fleming

1 a coffee table in the middle.

2 Q So where that brown couch is right now, what was in
3 its place?

4 A Which one?

5 Q The brown couch where it is.

6 A There is a red couch.

7 Q And the leather chair was where?

8 A In place of the other brown couch.

9 Q Okay.

10 So, just to clarify, right under the mirror, the red
11 chair was underneath that mirror, right?

12 A Yes.

13 Q And the leather chair was where the other side of that
14 couch is?

15 A Yes.

16 Q And the coffee table was in front of it?

17 A Yes.

18 Q And People's 7.

19 What is this?

20 A The same view of the living room.

21 Q People's 8?

22 A That's The Learning Center from the living room.

23 THE COURT: I'm sorry?

24 THE WITNESS: It is a picture of The Learning
25 Center from the living room.

Joanne Fleming

1 THE COURT: Thank you.

2 Q And People's 9?

3 A That's still The Learning Center.

4 Q Is that inside of The Learning Center?

5 A Yes.

6 Q I'm just going to go back to People's 6.

7 So, can you tell us where you sat and where the
8 defendant sat?

9 A I sat down in the black leather chair.

10 Q Mm-hmm.

11 A He sat across from me on the red couch.

12 Q So he sat directly below where that mirror is?

13 A Yes.

14 Q What happened after you and Lonnie sat down?

15 A We talked about school. He asked me how things are
16 going. I said fine. And I was still eating and drinking my
17 Smoothie, and then once I finished, he finished his as well, I
18 took the dishes to the kitchen, and I came back and said that I
19 had chores to do and that I had to clean, it would be best if
20 he left.

21 Q Before you move on, where did you take the empty
22 glasses and the dish?

23 A To the kitchen counter.

24 Q Is that where you left it?

25 A Yes.

Joanne Fleming

A407

1 Q And then you said you came back, and tell us again
2 what happened?

3 A I came back to the living room and I said that I had
4 chores to do and I had to clean.

5 Q I'm sorry?

6 A I said that I had chores to do and that it would be
7 best if he went. And he said okay. So, he stood up and we
8 were walking to the door and he gave me a hug.

9 Q How did that come about?

10 A He outstretched his arms as he was leaving and I gave
11 him a hug.

12 Q Why did you hug him back?

13 A Because he was familiar and it -- just a normal thing
14 to do if someone's leaving, to give them a hug.

15 Q Did you think anything of it?

16 A No.

17 Q What happened next?

18 A I started to pull away and he didn't let go.

19 Q When you say "he didn't let go," what do you mean?

20 A He kept his arms around me and he asked me why I was
21 being so shy and why I was pulling away. And I told him to let
22 me go and he didn't. And I tried pushing away.

23 Q How did you do that?

24 A I pushed my arms away from him.

25 Q What happened when you did that?

Joanne Fleming

C. Smith - People - Direct

1 A He held me by the shoulders and he asked me why I was
2 pushing him away. So I kicked him in the shin and he asked me
3 why I was trying to kick him. Then he grabbed my neck and he
4 started choking me and I tried to knee him. Then he shoved me
5 to the ground and I couldn't breath.

6 Q Do you need a minute?

7 A No, I'm fine.

8 Q And he put a hand over my mouth and he told me not to
9 scream, and he said that -- he said that if I did, he would
10 choke me out and I nodded that I won't scream, and when he took
11 his hand off my mouth, I tried to get away.

12 (Whereupon, Senior Court Reporter Amalia Hudson
13 took over the proceedings.)
14
15
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18
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Joanne Fleming

A409

PARK - DIRECT - C. SMITH

1 Q How did you do that?

2 A I turned over on my stomach, and I tried crawling
3 towards the kitchen, but he grabbed my ankle, and brought me back
4 toward him.

5 Q What happened after?

6 A And he pulled me over by the hair to a stool that was in
7 the Learning Center.

8 THE COURT: Ms. Park, if you can just pause for a
9 minute so the court reporter can come around and sit in front
10 of me.

11 (Pause in the proceedings)

12 Q I want to stop you for one minute and go back to when
13 he -- you said that he choked you?

14 A Yes.

15 Q Can you tell us how he did that?

16 A With both hands.

17 Q Did he put both hands around your neck?

18 A Yes.

19 Q And what did you feel?

20 A He squeezed.

21 Q How did that make you feel when he squeezed?

22 A Scared.

23 Q You also said that he took you down. Can you describe
24 what he did?

25 A He pushed me backwards until I was laying on my back on

Amalia Hudson, SCR

PARK - DIRECT - C. SMITH

1 the ground.

2 Q So that is you're face up at this point?

3 A Yes.

4 Q You also said that he had put his hand over your mouth?

5 A Yes.

6 Q Where was he when he did that?

7 A He was kneeling over me.

8 Q And back then in July 16, 2014, about how tall were you?

9 A I'm 5 feet.

10 Q And how much did you weigh?

11 A Like 120 pounds maybe.

12 Q Sorry?

13 A 120 pounds, I think.

14 Q Are you about the same size today as you were about a
15 year ago?

16 A Yes.

17 Q What about the defendant? How much -- what was his
18 height, if you know?

19 A He was at least half a foot taller than me.

20 Q How about his build? What was he like back in July of
21 last year?

22 A Like stocky, I guess.

23 Q Sorry. Stocky, did you say?

24 A Yeah.

25 Q You also mentioned that he grabbed your hair can you

Amalia Hudson, SCR

PARK - DIRECT - C. SMITH

1 tell us what kind of hair did you have last year in July?

2 A I had my hair in a bun like.

3 Q Is that how you had it on July 16 that day?

4 A Yes.

5 Q Did you have long hair?

6 A I had medium length hair. It's about the same length.

7 Q And how did he take you to the Learning Center?

8 A He lead me by my hair.

9 Q And where in the Learning Center did he lead?

10 A To a stool that was sitting in front of a closet.

11 Q What happened when you got to that stool?

12 A He told me to sit down.

13 Q Did you do so?

14 A Yes.

15 Q Why?

16 A I didn't want him to choke me again.

17 Q So what happened after you sat down?

18 A He told me to take off my pants, and I said, "No." And
19 he told me to do it again.

20 THE COURT: I know this is very difficult, but we
21 have to be able to hear you. So please keep your voice up
22 and speak into the microphone. Okay.

23 THE WITNESS: Okay. Sorry.

24 A He told me to take off my pants, and I said, "No." And
25 he told me to do it again. I shook my head no, and then he took